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Interim Steering Committee

Ross Butcher, President	John Fahlgren	Dan Bartel	Anna Morris	Jolene Ehlert
Fergus County	Valley County	State Representative	Treasurer	Secretary

June 17, 2020

Mr. William Pendley
Deputy Director, Policy and Programs
Bureau of Land Management
Exercising the Authority of the Director
1849 C Street NW, MS 6156
Washington DC 20240

Mark Albers
District Manager
North Central District Office
Bureau of Land Management
920 Northeast Main
Lewistown, MT 59457

Mr. John Mehlhoff
State Director
Montana/Dakotas State Office
Bureau of Land Management
5001 Southgate Drive
Billings, MT 59101

Tom Darrington
Field Manager
Malta Field Office
Bureau of Land Management
501 South 2nd St. East
Malta, MT 59538

Re: Report Transmittal; Termination of APR NEPA Process for Cause

Via: Electronic Submission; US Post - Certified Mail

Dear Messrs Pendley, Mehlhoff and Albers:

I write as President of Montana Natural Resource Coalition (MtNRC) to transmit a report entitled *Repurposing of Federally-Reserved Taylor Grazing Districts For Wildlife Rewilding: A Statutory, Administrative and Legal Analysis*, and to request that the Bureau of Land Management (BLM) immediately terminate the National Environmental Policy Act (NEPA) review of the American Prairie Reserve (APR) cattle-to-bison change is use application due to regulatory flaws and information deficiencies fundamental to proper administrative determinations.

As detailed in the attached *Repurposing* report, unambiguous BLM regulations do not allow bison to legitimately be classified as domestic livestock,[1] and thus access of privately owned, indigenous bison herds to commensurate BLM grazing lands associated with APR fee lands can only be granted under BLMs *Special Grazing and Leases* Regulations at 43 CFR § 4130.6-4. Permits issued under those regulations are limited in duration, subordinate to grazing preferences for domestic livestock, non-transferrable, and may only be issued for indigenous grazing after a compatibility demonstration with multiple use objectives and a consistency review with local and regional land use plans.

A multiple use compatibility analysis is fundamental to the *Special Grazing and Leases* permitting process because it would evaluate technical distinctions between domestic livestock and indigenous animals for purposes of grazing on BLM chiefly valuable for-grazing district lands, and evaluate deconstruction of physical improvements that would transition TGA grazing districts from multiple to dominant, rewilding land uses.

[1] 43 CFR § 4100.0-5 Definitions

The NEPA process BLM is using is fundamentally flawed because the bureau is processing the APR application under an incorrect body of regulations, and the administrative record is both errant and incomplete as a demonstration of bison compatibility with federal, multiple use objectives has not been incorporated with the NEPA public record or in public notification processes.

As detailed in the attached report, the public record is silent as to how - or if - BLM has conducted a chiefly valuable for grazing determination of potential boundary conflicts, economic disruptions, or impacts to local economies or the livestock industry arising from APRs proposal to transition federal working lands from domestic livestock grazing to dominant, wildlife-only use and management. Absent a multiple use determination, the NEPA process is deficient, premature and lacks fundamental information necessary to conclude the a magnitude of significance or impacts to the human health and the natural environment.

MtNRC concurs with the recommendations in the attached *Repurposing* report and is requesting that BLM accept APRs application withdrawal as stated in their September 24, 2019 letter. We request that BLM terminate the APR NEPA process pending submittal of an adequate application under the *Special Grazing and Leases* regulations, including an appropriate consistency analysis. Given the regional implications, we also request the Secretary of the Interior consider a moratorium and future spending on bison initiatives, such as the 2008 and 2020 Bison Conservation Initiatives or the 2014 Bison Report.

If APR elects to proceed with a multiple use compatibility analysis, MtNRC, as a coalition of local governments, is requesting that BLM convene from the onset a workgroup of affected county governments and local conservation districts. The proposed workgroup would jointly develop a binding scope, schedule and the procedural process to be used throughout the multiple use objective compatibility demonstration process.

Respectfully submitted,

The Montana Natural Resource Coalition
Ross Butcher, President
Fergus County Commissioner
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cc, w/hardcopy report:
Montana Congressional Delegation
D. Bernhardt - DOI Secretary
C. Hammond - DOI Deputy Assistant Secretary
D. Jorajani - DOI Solicitor
D. Hoelscher - Director, White House OIGA
W. Crozer - Special Assistant to the President White House OIGA
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Interim Steering Committee

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June 15, 2020

Ms. Aureila Skipwith
Director
U.S. Fish and Wildlife Service
1849 C Street NW, Room 3359
Washington, DC 20240

Mr. Rob Wallace
Assistant Secretary for Fish, Wildlife and Parks
U.S. Department of the Interior
1849 C Street NW, Room 3156
Washington, DC 20240

Re: Transmittal - Repurposing of Federally-Reserved TGA Districts Report;
Audit Request: 2012 Charles M. Russell Wildlife Refuge Comprehensive Plan

Via: US Postal Service - Certified Mail and Electronic Submission

Dear Ms. Skipwith and Mr. Wallace:

I write as President of Montana Natural Resource Coalition (MtNRC) to transmit the report entitled *Repurposing of Federally-Reserved Taylor Grazing Districts For Wildlife Rewilding: A Statutory, Administrative and Legal Analysis*, and to propose a scope for an administrative review and audit of the 2012 Comprehensive Conservation Plan and Record of Decision (CCP) for the Charles M. Russell National Wildlife Refuge (CMR).

The *Repurposing* report traces the history of Taylor Grazing Act Districts (TGA) through the Federal Land Policy Management Act, the Public Rangelands Improvement Act, the National Wildlife Refuge System Administration Act, the Game Range Act, and Executive Orders 7509 and 9132, and applies congressional and executive intent to TGA Districts within the CMR that were withdrawn prior to establishment of the Fort Peck Game Range.

Through this correspondence, and using the *Repurposing* report as a basis, the local governments of MtNRC are requesting the Director of USFWS (Director) and the Secretary of the Interior (Secretary) to publish an inventory of known TGA Districts within the CMR, and perform an consistency audit of the prescriptive, domestic livestock policies codified in the 2012 CCP against the *specific purposes* for which the CMR is to be managed in 16 USC § 668dd (3)(A), Executive Order 7509 and case law.

Concurrent with the audit, MtNRC is also requesting the Director and the Secretary to assess whether Federally-surveyed TGA Districts 1, 2 and 6 - known to predate the Fort Peck Game Range and still operative within the CMR - are being administratively managed or legitimately retired in accordance with a 2003 opinion by the Solicitor of the Interior.[1]

[1] Memorandum. *Clarification of M-37008*. Office of the Solicitor of the Interior to Assistant Secretary - Policy, Management and Budget. May 13, 2003.

MtNRC believes that TGA District lands withdrawn and reserved prior to the Fort Peck Game range to still be legally present within the CMR, and that the purposes and hierarchy of access to forage for grazing of domestic livestock to be applicable and binding upon the Director as part of her administration of the CMR refuge unit. To that end, we are also requesting a determination as to whether indigenous animals, such as bison, have a legitimate priority of access to forage above domestic livestock after target thresholds for sharptail grouse and antelope have been met.

As part of the audit and requested determination, MtNRC is requesting the Director and Secretary to incorporate the TGA District Maps, legally described in Executive Order 7509 and reiterated in Executive Order 9132, as an addendum to the 2012 CCP with a thorough description of the applicability of the TGA to the CMR.

Respectfully submitted,

The Montana Natural Resource Coalition
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cc: D. Bernhardt - Secretary, Department of the Interior (Hardcopy)
D. Jorjani - Solicitor, Department of the Interior (Hardcopy)
D. Hoelscher - Director White House OIGA (Hardcopy)
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S. Guertin - Deputy Director, USFWS, DC (Hardcopy)
N. Walsh - Regional Administrator, USFWS Mountain-Prairie Region (Hardcopy)
P. Santavy - Project Lead, Charles M. Russell Wildlife Refuge (Hardcopy)

Bringing Voice and Natural Resource Decision-making to Local Government

Repurposing of Federally-Reserved Taylor Grazing Districts For Wildlife Rewilding: A Statutory, Administrative and Legal Analysis

Prepared for:
The Montana Natural Resource Coalition
PO Box 468
Lewistown Montana 59457

"Complex Problems Solved Well"

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April 22, 2020

EXECUTIVE SUMMARY

Promotion of landscape-level rewilding proposals for vast regions of the western United States has brought deep questions as to whether federal districts and lands reserved principally for grazing of domestic livestock may legitimately be repurposed to dominant land use for wildlife-only uses.

This work began as an inquiry into the administrative mechanism that constrains Bureau of Land Management (BLM) as it considers a domestic, livestock-to-bison Change-in-Use (CIU) application for the American Prairie Reserve (APR) on BLM lands in Montana Taylor Grazing Districts 1 and 6. The APR request itself is straightforward to evaluate, as unambiguous BLM regulations do not allow for bison to be legitimately classified as domestic livestock, and access to commensurate grazing districts can only be granted under BLMs *Special Grazing and Leases Regulations* at 43 CFR § 4130.6-4. As a result, repurposing of federal districts for bison grazing first requires a demonstration of multiple use compatibility with domestic livestock, and a consistency demonstration with local land use plans.

We were astonished that for the billions of dollars being spent in land purchases, conservation acquisitions, rewilding campaigns, lobbying, and other promotional activities, that neither the conservation community, academia, federal agencies, nor the funders themselves have commissioned a compatibility analysis that evaluates whether - or if - rewilding initiatives are compatible with congressional mandates, land use statutes, executive orders, administrative regulations or other policies of the United States.

This work addresses the information gap through evaluation of the APR CIU process and by raising issues surrounding the purpose for which the Charles M. Russell (CMR) Wildlife Refuge has been established, as both the APR and CMR initiatives ultimately propose to transition Montana Taylor Grazing Act Districts 1, 2 and 6 to dominant, wildlife-only rewilding use.

Our approach places multinational, landscape-level rewilding initiatives and philosophies in context with 100 years of US administrative and legislative land-use policy, and we specifically apply eleven acts of congress, three executive orders, three memoranda by the Solicitor of the Interior, and case law to conclude that regional rewilding initiatives require substantive congressional, executive or secretarial-level actions, and that the CMR Comprehensive Plan is administratively deficient.

An important finding of this research is that vast regions of geopolitical, cadastral-bounded lands classified under the Taylor Grazing Act as *chiefly valuable for grazing* (CVG) districts are Reservations as defined under the Federal Power Act (FPA). The reservation designation has far reaching implications for CVG districts and the CMR as administered by the Secretary of the Interior, and national forest lands administered by the Secretary of Agriculture, Chief of the US Forest Service.

The presence of millions of acres of federally-reserved, CVG districts across the western United States raises questions as to why cadastrally surveyed, geopolitical maps and TGA land inventories are not routinely incorporated in BLM Land Use or Resource Management Plans, Forest Management Plans, or Wilderness Management Plans along with environmental-related designations, such as Areas of Critical Environmental Concern (ACEC), Wilderness Study Areas (WSAs) or Wild and Scenic Rivers (WSRs). Omission of maps, inventories, and TGA requirements in land use plans, we believe, is the primary factor leading to the belief that CVG districts may easily be repurposed for rewilding.

No public funds were used in research, preparation, production, or legal review of this report.

PREFACE

Since the late 1970s, the land and forest planning processes of the Secretaries of the Interior and Agriculture have drifted from the congressional principles that form the basis of the Taylor Grazing Act, Chiefly Valuable for Grazing (CVG) district system. Varying approaches, ideas, or individual philosophies being promoted by local or regional agency offices during land use planning processes have increasingly marginalized the importance, character, and nationalistic contribution of the TGA CVG district system to the meat supply chain of the United States.

The current disruption in the world meat supply system is traced to centralized control of the meat slaughter and distribution capacity by four, multi-national meat packing conglomerates and retail grocery distribution companies. Slaughter plant closures brought about by corona virus induced labor shortages, and government-imposed quarantine policies have revealed systemic weaknesses across a monopolized, global meat supply system - a situation that is exacerbated by US meat inspection policies that inhibit local slaughterhouses from processing surplus animals into retail markets.

The globalist philosophy that dominates the world meat supply chain is also observed in rewilding initiatives being promoted by multinational conservation groups, the academic community, and even some federal employees for tens of millions acres of TGA lands across the western United States. These initiatives, if realized, would permanently transition through administrative governmental processes a system whose foundation rests upon the longstanding federal doctrine of multiple land use and sustained yield.

The objective of this work has not only been to identify fundamental land use policy issues and their foundational cause, but also to propose positive, appropriate, and practical solutions to what otherwise is a significant, multigenerational, multi-agency problem. With timelessness and usefulness in mind, we remain hopeful that those county governments, federal agencies, US citizens, and civic-minded conservation groups who are genuinely interested in US law and history will find this document useful for engagement during federal, land use planning processes in those lands containing CVG districts.

We respectfully propose to the President of the United States that he create a temporary, cabinet-level committee whose purpose and charter is to obtain from the US Senate, National Archives, or affected federal agencies the *original*, geopolitically bounded, cadastrally surveyed, CVG district maps covered by Executive Orders 6910, 6964, 7509 and subsequent land withdrawals.

Official maps of the reserved CVG districts and lands, along with the requirements imposed by TGA and subsequent statutes, would then be incorporated as addenda through the appropriate land and public processes in any land use, forest, wilderness, or resource management plan host to that respective CVG district. Conflicts with reserved CVG districts or lands resulting from post TGA agency actions, if any, would be resolved by the Secretaries on a case-by-case basis.

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1.0 BACKGROUND

1.1 Introduction; Summary of Issues and Approach -

1.1.1 Scope -

In June 1934, through enactment of the Taylor Grazing Act (TGA), the United States Congress provided for classification of vacant, unreserved and unappropriated federal lands across a twelve-state region of the western United States. The TGA, as implemented through executive orders and several congressional acts, includes administrative mandates, provisions for orderly use and improvement of rangeland, requirements for collection and distribution of revenues to host county governments, and standards for economic stabilization and prioritization of the domestic livestock industry.

Five months after enactment of TGA, President Roosevelt issued Executive Order 6910, an action that withdrew 80 million acres of marginal federal lands for classification as *chiefly valuable for grazing* (CVG) of domestic livestock. Together, the TGA and EO 6910 enacted a massive, geopolitically bounded, cadastral grazing district system whose primary purpose is to improve and develop marginal federal lands reserved for grazing of domestic livestock.[1] The history and substance of the TGA system and federal, multiple land use doctrine still exist today, being integral throughout the fabric of U. S. law. The TGA system still applies to vast areas of lands, forests and wilderness areas administered by the Secretaries of the Interior and Agriculture.

In recent decades, Taylor Grazing Act Districts (CVG districts) reserved as *chiefly valuable for grazing* have been the subject of competing, landscape-level rewilding initiatives whose objective is to transition federal working lands from domestic livestock grazing to dominant, wildlife-only use and management. Conspicuously absent from the public policy discussion and academic studies is how multinational, landscape level initiatives propose to reconcile federal, state and county geopolitical boundaries, the interspersed nature of governmental and private inholdings, issues resulting from wildlife encroachment on agricultural interests, cultural impacts to rural areas, or conflicts posed by rewilding proposals to federal multiple land use doctrines - the subject of this paper.

1.1.2 Approach -

This work presents foundational, on-the-books statutory and administrative mandates that delegate authority to federal agencies for repurposing of CVG districts from multiple to single (dominant) land use. Our approach traces and applies the congressional intent for the CVG district system through eleven congressional acts, multiple executive orders, and the administrative record over a one-hundred-year timeline. Table 1 provides a summary of referenced authorities.

[1] 43 CFR § 4100.0-5 Definitions. "*Livestock or kind of livestock means species of domestic livestock- cattle, sheep, horses, burros, and goats*."

Table 1 Summary of Applied Authorities		
Statutes	Year	Citation
The Stock raising Homestead Act (repealed)	1916	Pub. L. 64-290, 43 USC § 291 et seq.
The Federal Power Act	1920	16 USC § 796(2)
The Taylor Grazing Act	1934	43 USC § 315 et seq.
Multiple Use and Sustained Yield Act	1960	16 USC 528-531
Disposition of Certain Federal Lands	1964	Public Law 88-607 (repealed)
The National Wilderness Preservation System Act	1964	16 USC § 1133 (a)(1)
National Wildlife Refuge System Administration Act	1966	16 USC § 668 dd
Game Range Act	1976	Pub.L. 94-223; H.R. 5512
Federal Land Policy Management Act	1976	43 USC §§ 1701-1781; Pub. L. 94–579
The Public Rangelands Improvement Act	1978	43 USC§§ 1901-1908
National Wildlife Refuge System Improvement Act	1997	Pub. L. 105-57; 111 Stat 1253
Executive Orders		
Executive Order 6910	1934	Withdrawal for Classification of All Public Lands in Certain States
Executive Order 7509	1936	Establishing the Fort Peck Game Range
Executive Order 9132	1942	Withdrawing Public Lands for Use of War Department in Connection of Fort Peck Dam and Reservoir
Administrative Opinions - Solicitor of the Interior		
Department of Interior, Office of Solicitor Memorandum M-37008	2002	
Department of Interior, Office of Solicitor Memorandum: Clarification to M-37008	2003	
Department of Interior, Office of Solicitor Memorandum: *Whether Public Lands are Reservations for Purposes of FPA*	2001	
Congressional Reports		
Public Land Review Commission Report	1970	*One Third of the Nation's Land*

Having established the congressional record of the CVG district system, we then apply our findings to an incremental and ongoing rewilding initiative in northcentral Montana, where the American Prairie Reserve (APR) has filed a cattle-to-bison, Change-In-Use (CIU) application with a local Bureau of Land Management (BLM) office. At the time of this report, the revised APR application is under review by BLM using National Environmental Policy Act (NEPA) processes. Using the APR CIU request as an example, we address problems with that initiative in the context of land use and multiple use principles. We also propose a solution consistent with multiple use principles that would allow the APR application to go forward.

The revised APR CIU application[2] includes areas of public lands which are reserved for grazing of domestic livestock under the TGA. The application requests BLM to transition grazing allotments in CVG districts 1 and 6 from cattle to bison grazing, and will likely result in modifications to, or conflicts with, TGA CVG district boundaries, requiring the Secretary of the Interior to perform and publish in local land use plans a *Chiefly Valuable for Grazing Determination* (Appendix A, Maps).

[2] Untitled and unsigned submittal to Tom Darrington and Clive Rooney presumably at BLM. September 24, 2019.

Our research also finds that administrative processes used by the Director of the US Fish and Wildlife Service (FWS) since 1986 to retire grazing allotments within the Charles M. Russell Wildlife Refuge (CMR) have departed from the original of the CMR established in Executive Order 7509 and its foundational mandate, the TGA. At the core of this issue lies the question as to whether the Director of FWS is bound by statute to administer grazing districts within the CMR in accordance with EO 7509 TGA mandates.

Departure of FWS from the Administrative mandates of TGA that require protection and improvement of CMR grazing lands, and the widespread hope by the conservation community that TGA CVG districts within the CMR may be repurposed to rewilding without congressional or secretarial action is a result of failure to include geopolitical TGA CVG district maps and TGA mandates in federal land use plans and processes. This situation, albeit large in scope, may be corrected through an executive order to multiple agencies that administer the TGA requiring incorporation of an inventory of TGA Districts and geopolitical, cadastral maps as addendum to federal land use, forest management, or wilderness protection plans host to TGA Districts. We also respectfully recommend the Director of FWS evaluate the secondary purpose for which the CMR is to be administrated and revise the 2012 CMR Comprehensive Plan[3] as appropriate.

1.1.3 TGA History, Implementing Executive Orders, and the CVG district System -

Congressional and Executive Actions

In June 1934, Congress enacted the Taylor Grazing Act (TGA), and in the fall of that same year, President Roosevelt issued Executive Order 6910 (Appendix B). These combined legislative and executive actions withdrew 80 million acres of "*vacant, unreserved and unappropriated*" federal public land across twelve western states for permanent classification as chiefly valuable for grazing (CVG) districts:

> *"NOW, THEREFORE…….it is ordered that all of the vacant, unreserved and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah and Wyoming be, and hereby is, temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, and for conservation and development of natural Resources."*[4]

In February 1935, using land withdrawal authority under the now repealed Pickett Act,[5] President Roosevelt issued Executive Order 6964 effecting the withdrawal of *all* remaining public lands from across an additional twelve-state region[6] (Appendix B). The combined executive actions, along with concurrent appropriations by Congress, increased

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3 Comprehensive Conservation Plan - Charles M. Russell National Wildlife Refuge - UL Bend National Wildlife Refuge - Montana. Stephen D. Guerten Regional Director, US Fish and Wildlife Service Region 6. July 2012.

4 Executive Order 6910. January 28, 1934.

5 Pickett Act of June 25, 1910. Ch. 421, 36 Stat. 847 et seq. (43 USC § 141 et seq.)

6 Executive Order 6964. February 2, 1935.

the original acreage for CVG classification from 80 to 142 million acres,[7] reportedly drawing ire from the General Land Office that as of the summer of 1935, no unreserved public lands remained in the federal system:

> "*Because of the withdrawals made by the Executive orders…there were no unreserved public lands at the close of business on June 30, 1935*."[8]

As of 1999, approximately 135 million acres[9] of BLM-managed lands remain withdrawn and reserved from private appropriation, a majority of which are still classified and mapped as CVG districts and lands to be managed under TGA.

Around the time of withdrawal, a new agency, the Division of Grazing, was authorized by Congress within the Department of the Interior (DOI). The central purpose of the Division of Grazing (later the Grazing Service, and in 1946 the Bureau of Land Management) was to administer the TGA classification process to improve marginal TGA lands through orderly development, and implementation of a geopolitical boundary management system:

> *"…the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range;*[10]*"*

One central purpose for BLM was to understand and administer the CVG district system and TGA mandates.

Collectively, the CVG district classification system and subsequent legislation transitioned the land use policy of the United States from one of land disposition to that of land retention, sequestration, and management.[11] The CVG district system was specifically intended to facilitate classification, orderly use of range, and active, human improvements for special-use *chiefly valuable for grazing* lands reserved for domestic livestock.[12] Moreover, the TGA system also incorporates economic considerations, provisions that ensure livestock industry protection, and ultimately the system was designed to safeguard the food supply of the United States. The statutory history of the CVG districts and current land use statutes do not contemplate foraging competition and conflicts with domestic livestock operations that would result from regional rewilding.

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7 On June 26, 1936 Congress increased the TGA acreage from 80 million acres to 142 million acres.

8 General Land Office Annual Report. 1:2. 1935.

9 Estimates of the number of BLM acres vary widely - both within the agency and in the external public record.

10 43 USC § 315a. Protection, administration, regulation, and improvement of districts; rules and regulations; study of erosion and flood control; offenses.

11 The Federal Lands: Their Use and Management. Marion Clawson and Burnell Held. Johns Hopkins Press, 1957. pps 27-34.

12 43 CFR § 4100.0-5 Definitions. "*Livestock or kind of livestock means species of domestic livestock- cattle, sheep, horses, burros, and goats*."

1.1.4 Background, Philosophy, and Summary of Montana Rewilding Initiatives -

Over the past twenty years, well-funded multinational conservation groups, the academic community, and even some federal agencies have proposed to transition vast regions of the northern Great Plains containing CVG districts to rewilding through introduction of "keystone" or "umbrella" species, including bison. A common theme in the "buffalo commons" vision and the Vermejo Statement[13] is the purchase of economically distressed fee lands with commensurate, federally-controlled grazing allotments, followed by Change-In-Use (CIU) applications to local agency offices requesting approval to deconstruct rangeland improvements and infrastructure. These requests, if approved and effected, will permanently affect CVG districts and transition grazing leases from multiple and domestic livestock use to singular use.

In December 1987, the American Planning Association published an article by Frank and Deborah Popper in its journal, *Planning*, titled *The Great Plains: From Dust to Dust*.[14] Believing agricultural pursuits to be degrading lands across Great Plains, the Poppers called for creation of a "buffalo commons" national reserve across a ten state area. In the Popper's vison, bison would occupy a vast and unexploited area in what could eventually become a massive, public-private preservation project implementing rewilding principles.

The progressive buffalo commons philosophy has not been well received by regional ranchers, business interests, or the general public in the great plains region, but the notion has gained popularity with philanthropic organizations from New York and Massachusetts, and wealthy German and Dutch donors. The literature also includes participation and promotion by employees of the BLM, USFS, USGS and Montana state agencies. As a result, tax dollars may be funding initiatives that conflict with statutory TGA mandates.

The buffalo commons philosophy has persisted in its attempt to shift land use policy away from multiple use and toward dominant, landscape ecosystem management for wildlife-only restoration. Conservation biology has become a formal discipline in academic circles, and land trusts, such as The Nature Conservancy (TNC), now include bison in several of their habitat restoration and funding programs. Appendix C contains a more detailed review of the landscape conservation philosophy, movement, and history.

In 1999, TNC published *Ecoregional Planning in the Northern Great Plains Steppe,*[15] targeting specific regions of the northern Great Plains believed to be the most viable for conservation and restoration. This formed the geographical basis for the Northern Plains Conservation Network (NPCN), which again was transformed into the Great Plains Conservation Network (GPCN). GPCN's stated mission is to "*restore and maintain the native species, habitats, and natural resources of the Great Plains*" by preventing habitat loss and fragmentation, restoring wildlife, facilitating wildlife movement, and other ecosystem processes.

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[13] See Appendix C: *History and Philosophy of Conservation and Rewilding Efforts.*

[14] Popper, D., Popper, F. *The Great Plains: From Dust to Dust - A daring proposal for dealing with an inevitable disaster.* American Planning Association *Planning*, December, 1987.

[15] Northern Great Plains Steppe Ecoregional Planning Team. *Ecoregional Planning in the Northern Great Plains Steppe*. The Nature Conservancy. February 4, 1999.

Landscape-scale initiatives propose to transcend municipal and political boundaries, and neither the literature nor initiatives themselves contain meaningful discussion as to how rewilding initiatives would address state and local geopolitical boundary conflicts, longstanding jurisdictional prerogatives, or compatibility with unambiguous statutes governing CVG districts and private inholdings.

One of GPCN's members, the American Prairie Foundation (APF) [later renamed the American Prairie Reserve (APR)], proposes to establish a 3.5 million-acre bison conservation area with their herds on grazing fee properties and BLM grazing leases near the Charles M. Russell National Wildlife Refuge (CMR). APR's stated goal is to develop and maintain a conservation herd of at least 10,000 animals across roughly 5,000 square miles of Montana and some literature proposes the CMR as an "anchor point." This raises the question as to whether administration of the CMR allows for bison in CVG districts within the CMR. Our research concludes that the CMR, originally withdrawn as the Fort Peck Game Range (FPGR) was established as TGA districts 1, 2, and 6. We also found the record to be silent as to the administrative requirements imposed on the Secretary of Interior to retire these districts.

In 2005 and 2006, the Wildlife Conservation Society hosted a three-meeting series to set a vision for the ecological future of bison in North America. The results were published in a USGS-funded scholarly article titled *The Ecological Future of the North American Bison: Conceiving Long-Term, Large-Scale Conservation of Wildlife.*[16]

The Vermejo Statement resulted from the second meeting in the series:

> *"Over the next century, the ecological recovery of the North American bison will occur when multiple large herds move freely across extensive landscapes within all major habitats of their historic range, interacting in ecologically significant ways with the fullest possible set of other native species, and inspiring, sustaining and connecting human cultures."*

The Vermejo Statement, a work product that included participation by personnel from federal agencies, set a landscape level vision of five values. It is: large-scale; long-term; inclusive; fulfilling of different values; and ambitious. It also transcends reserved TGA CVG districts.

In a 2019 article describing how to merge land use policy with rewilding objectives titled "*Incorporating wildlife connectivity into forest plan revision under the United States Forest Service's 2012 Planning rule,"*[17] the authors published the results of a wildlife connectivity study in the Custer-Gallatin National Forest (CGNF). The results are specifically aimed at including rewilding initiatives during revision of the CGNF forest plan.

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[16] Sanderson, Eric W.; Redford, Kent H.; Weber, Bill; Aune, Keith; Baldes, Dick; Berger, Joel; Carter, Dave; Curtin, Charles; Derr, James N.; Dobrott, Steve; Fearn, Eva; Fleener, Craig; Forrest, Steve; Gerlach, Craig; Gates, C. Cormack; Gross, John E.; Gogan, Peter; Grassel, Shaun; Hilty, Jodi A.; Jensen, Marv; Kunkel, Kyran; Lammers, Duane; List, Rurik; Minkowski, Karen; Olson, Tom; Pague, Chris; Robertson, Paul B.; and Stephenson, Bob, "*The Ecological Future of the North American Bison: Conceiving Long-Term, Large-Scale Conservation of Wildlife*" (2008). USGS Staff - Published Research. 608. https://digitalcommons.unl.edu/usgsstaffpub/608

[17] Williamson, M., Creech, T., Carnwath, G., Dixon, b., Kelly, V. *Incorporating wildlife connectivity into forest plan revision under the United States Forest Service's 2012 Planning rule*. Society for Conservation Biology. *Conservation Science and Practice.* 2019; e155.

The study region incorporated 100-mile buffers around CGNF units, merging adjacent private lands along with state and federal public lands. While no recommendations for regulating private lands were included, the authors noted the "*critical role of focusing conservation efforts on private lands to maintain regional connectivity.*" This study did not include evaluation of jurisdictional boundaries, economic impacts to local government, or a review of CVG districts or land, but it did prompt us to review the presence and administrative responsibility of the Chief of Forest Service for CVG districts in the national forest and wilderness system.

The World Wildlife Fund (WWF) is presently scoping locations in the Great Plains where conservation herds of bison, each numbering 1,000 animals or more, may be established. Partners to the WWF effort include the Oglala Sioux, the Fort Peck and Fort Belknap reservations, and Yellowstone National Park.[18]

In the thirty year period since *The Great Plains: From Dust to Dust* was published, the prolific stack of scientific literature, collaborative proposals, land purchases, and funding proposals do not contain meaningful discussion of how the buffalo commons, the Vermejo Statement, or specific landscape-level conservation proposals are consistent with US statutes, regulations, land use practices, or case law of the United States.

1.2 Application of Federal Statutes and Authorities -

1.2.1 The Federal Doctrine of Multiple Use and Sustained Yield

The Multiple Use Sustained Yield Act (MUSYA) of 1960 directs the Secretary of Agriculture to administer the five primary resources of the national forests for purposes of multiple use and sustained yield. In that act, MUSYA was *"declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897* (16 USC § 475)[19]. This mandates that the forests of the United States be managed for *"favorable conditions of water flow"* and to *"furnish a continuous supply of timber for the necessities of the citizens of the United States.*"

"Multiple use" is defined in MUSYA as:

> *"the management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people."*

"Sustained yield," is defined as:

> *"the achievement and maintenance in perpetuity of a high level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land."*

[18] https://www.worldwildlife.org/species/plains-bison Plains Bison web page at *What WWF is Doing.*

[19] 16 USC §5§ 528-531. Pub. L. 86-517. June 12, 1960.

Public Law 88-607 (1964)[20] was enacted for interim management pending the Public Land Law Review Report (PLLRR) in 1970. Public Law 88-607 carried forward the multiple use sustained yield doctrine from previous statutes, including the Taylor Grazing Act.

MUSYA mandates also apply to CVG districts managed by USFS in wilderness areas as codified in The National Wilderness Preservation System Act:

> *"Nothing in this chapter shall be deemed to be in interference with the purpose for which national forests are established as set forth in the Act of June 4, 1897, and the Multiple-Use Sustained-Yield Act of June 12, 1960."*[21]

and,

> *"the grazing of livestock, where established prior to September 3, 1964, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture."*[22]

From a statutory and case law perspective, livestock grazing within wilderness areas and National Forests has always been considered a compatible, principal, and presumptive use.[23]

1.2.2 TGA Districts as Adopted in the Federal Land Policy Management Act

In October 1976, after a decade of studies, legislative debate, and issuance of a comprehensive report on the condition of public lands by the Public Land Law Review Commission (PLLRC),[24] the 95th Congress enacted the Federal Land Policy Management Act (FLPMA).

FLPMA adopted nearly all the 137 recommendations from the PLLRC Report, itself the work of a twelve-year legislative effort. In 1964, through Public Law 88-607,[25] the Secretary of the Interior was required to develop criteria that would distinguish between those public lands slated for disposition and lands to be retained for ongoing management and administration.

Section (a) of Public Law 88-607 explicitly excludes *lands chiefly valuable for grazing and raising forage crops* from lands that may be classified for disposition, a distinction recognized in statute the presence and function of the TGA CVG district system:

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20 Public Law 88-607.

21 16 USC § 1133 (a)(1).

22 16 USC § 1133 (3)(d)(4)(2).

23 PLC v. Babbitt, 167 F.3d 1287, 1308 (10th Cir. 1999), aff'd on other grounds, 529 U.S. 728 (2000) *"As long as the boundary of the grazing district remains in place and the classification and withdrawals remain in effect, there is a presumption that grazing within a grazing district should continue."*

24 *One Third of the Nation's Land — A Report to the President and to the Congress by the Public Land Law Review Commission*. (1970).

25 Public Law 88-607. 78 Stat 986. September 19, 1964 (repealed).

> *"The Secretary of the Interior shall develop and promulgate regulations containing criteria by which he will determine which of the public lands and other Federal lands, including those situated in the State of Alaska exclusively administered by him through the Bureau of Land Management shall be (a) disposed of because they are (1) required for the orderly growth and development of a community or (2) are chiefly valuable for residential, commercial, agricultural (exclusive of lands chiefly valuable for grazing and raising forage crops), industrial, or public uses or development or (b) retained, at least during this period, in Federal ownership and managed for (1) domestic livestock grazing, (2) fish and wildlife development and utilization, (3) industrial development, (4) mineral production, (5) occupancy, (6) outdoor recreation, (7) timber production, (8) watershed protection, (9) wilderness preservation, or (10) preservation of public values that would be lost if the land passed from Federal ownership."*

Chiefly valuable for grazing lands were expressly excluded from disposition in Public Law 88-607 because they had already been withdrawn, reserved and classified under TGA specifically for the grazing of domestic livestock.

In FLPMA Title I, Congress reiterated and clarified the MUSYA terms "multiple use" and "sustained yield," and identified only seven limited "Principal Use" categories to be applied during administration of public lands by the secretaries of Interior and Agriculture.

The preeminent position of domestic livestock grazing over the remaining land use values, as well as vast land area set aside for CVG districts, reflects the priority of domestic livestock grazing throughout the history of the Grazing Service and later the BLM. Moreover, FLPMA codified into United States law a longstanding congressional priority for domestic livestock to remain a Principal Use on federal lands set aside for chiefly valuable for grazing purposes:

> *"The term "principal or major uses" includes, and is limited to, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production.*[26]

The first-among-equals principal use of domestic livestock grazing was reflective of congressional preference and priority over other principal uses. It also indicated congressional intent and an understanding of the importance of managing CVG districts in accordance with TGA mandates: orderly use; range improvement; regulation of occupancy; and stabilization of the national domestic livestock industry dependent upon federal range.

[26] 43 USC § 1702(l).

In FLPMA Title I, Congress recognized FLPMA as being supplementary to those public land laws not expressly repealed during the FLPMA process. In Title VII, Congress maintained intact the CVG district reservation, boundary, and land classification system established in the Taylor Grazing Act. This means that pre-FLPMA CVG districts and lands classified as *chiefly valuable for grazing* in the national forest and wilderness are to be managed according to the TGA mandates adopted in FLPMA:

> *"The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law."*

and,

> *"All withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law."*[27]

In an uncommon repudiation of previous land withdrawals by the executive, and an assertion of its own constitutional authority[28] to administrative agencies and the US Supreme Court, in FLPMA the Congress repealed the *implied delegation doctrine* and nullified the expansive Midwest Oil decision.[29] Congress also adopted TGA as the organic, foundational statute under which CVG districts are to be managed:

> *"IV. Withdrawal Authority Under FLPMA.*
>
> *A. Most (29) statutory provisions for Executive withdrawal authority were expressly repealed. FLPMA §704(e). Pub. L. No. 94-579. 90 Stat. 2744. 2792 (1976).*
>
> *1. All withdrawals in effect at the time of enactment were preserved. 43 USC §1701(c).*
>
> *2. Some statutes were not repealed, including the Antiquities Act, 16 USC §431 et seq.; the Defense Withdrawals Act, 43 USC §155 et seq.; the Fish and Game Sanctuaries Act. 16 USC §694; the Taylor Grazing Act, 43 USC §315 et seq.; and the Alaska Native Claims Settlement Act. 43 USC §§161000(3), 1615(d)(1), 1616(d)(1).*
>
> *3. The President's 'implied authority' under Midwest Oil was also repealed."* [30,31,32]

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27 43 USC §1701 note. 701(c). Pub. L. 94-579. Effect on existing rights.

28 43 USC § 1701(a)(4). Declaration of policy.

29 United States v. Midwest Oil, 236 U.S. 459 (1915).

30 Getches, David H. *Managing the Public Lands: The Authority of the Executive to Withdraw Lands.* Nat. Resources J. Vol. 22 April 1982. pps 279-289. http://scholar.law.colorado.edu/federal-land-policy-and-management-act/12.

31 Getches, David H., "*Withdrawals of Public Lands Under the Federal Land Policy and Management Act*" Summer Conference (June 6-8 1984) http://scholar.law.colorado.edu/federal-land-policy-and-management-act/12.

32 43 USC §1701 note. Sec. 704 (a) Repeal of withdrawal laws.

In May 2003, the Solicitor of the Interior issued a clarification to memorandum M-37008, a directive that defines the conditions under which the Secretary of the Interior is required to perform a *chiefly valuable for grazing determination* (CVGD) on CVG district or grazing lease lands. In assessing CVGD applicability, the solicitor focused on those administrative actions that could compromise CVG district boundaries, result in interdistrict disruption to other grazing allotments, or affect revenues to state and local governments (Appendix E).

One important factor to be considered when making CVG determinations is whether rangeland health can continue to be improved without construction or maintenance of physical or mechanical rangeland improvements:

> *"Whenever the Secretary considers retiring grazing permits within a grazing district, she must determine whether the permitted lands remain chiefly valuable for grazing if any such retirement may ultimately result in the modification of the district's boundaries. This determination must be adopted in a land use plan or through an amendment to the existing plan. Administrative factors the Secretary should consider in making this determination are:*
>
> *(1) the disruptive effect to any remaining grazing allotments within the district;*
> *(2) the decision's effect on the distribution of future grazing revenues within the district; and*
> *(3) whether rangeland health can be improved without constructing or maintaining physical range improvements."*[33]

With respect to adoption of TGA in FLPMA, the Solicitor of the Interior notes that congress did not repeal the provisions of TGA, but instead protected and preserved the CVG district grazing, permit, and classification system:

> "*When enacting FLPMA, Congress did not repeal or modify the grazing provisions of the TGA. Instead, FLPMA set forth a new structure for the Secretary and the BLM to manage federal lands. Congress also expressly protected the grazing permit system as contemplated by the TGA and expressly preserved the classifications and withdrawals that led to the creation of grazing districts*."[34]

According to the Solicitor of the Interior, the TGA mandates and CVG district system were preserved in FLPMA and remain binding for administrative and land use planning processes for all agencies in the Department of Interior. Because CVG districts and grazing lands in the national forest system are under administration of the Secretary of Agriculture and Chief of US Forest Service, the substance of the CVG determination directives in M-37008 and congressional mandates in FLPMA may reasonably be applied to the Department of Agriculture.

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[33] Memorandum. *Clarification of M-37008*. Office of the Solicitor of the Interior to Assistant Secretary - Policy, Management and Budget et al. May 13, 2003.

[34] Ibid. pps 4.

1.2.3 Range Improvements Defined: The Public Rangelands Improvement Act of 1978

Two years after the enactment of FLPMA, the unsatisfactory condition and low productivity of CVG districts and lands captured the attention of the 96th Congress, which responded with passage of the Public Rangeland Improvement Act of 1978 (PRIA).

In its PRIA policy statement, Congress expressed concern that CVG districts and lands were under-producing and erosion was contributing to siltation and salinity of major watersheds and reservoirs. Congress also noted that federal range programs were underfunded, and yet again referred to the TGA priority that the domestic livestock industry be stabilized.

The PRIA statutory construct specifically includes provision for active improvement of CVG district rangelands, economic protection for the domestic livestock industry, and language that furthers the TGA range development and improvement programs:

> *"unsatisfactory conditions on public rangelands present a high risk of soil loss, desertification, and a resultant underproductivity for large acreages of the public lands; contribute significantly to unacceptable levels of siltation and salinity in major western watersheds including the Colorado River."*[35]

and,

> *"to prevent economic disruption and harm to the western livestock industry, it is in the public interest to charge a fee for livestock grazing permits and leases on the public lands which is based on a formula reflecting annual changes in the costs of production;"*[36]

The Secretary of the Interior and the Chief of the US Forest Service are bound by statute to administer rangeland protection, rangeland development, and land use planning programs in accordance with improvement objectives adopted through TGA, FLPMA, and PRIA. Importantly, one express objective for rangeland programs is to improve and develop range conditions for productivity using a local land and forest management inventory and land use planning processes.

To facilitate the range development and improvement goals, PRIA codifies in one statute, *in pari materia*,[37] the range improvement and fee program established in Title IV of FLPMA, the doctrine of multiple use and sustained yield, and land use planning and inventory statutes applicable to both Department of the Interior and the US Forest Service:[38]

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35 43 USC § 1901(a)(3) Congressional findings and declaration of policy.

36 Ibid. 43 USC § 1901(a)(5).

37 ***in pari materia*** **1.** *adj*. On the same subject; relating to the same matter. It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject. See RELATED-STATUTES CANON; *cognate act* under ACT (3). "[I]t seems that the present position is that, when an earlier statute is *in pari materia* with a later one, it is simply part of its context to be considered by the judge in deciding whether the meaning of a provision in a later statute is plain." Rupert Cross, *Statutory Interpretation* 128 (1976). *Black's Law Dictionary, 10th edition*.

38 43 USC § 1901(b)(1) FLPMA Title 5.

> "*Following enactment of this chapter, the Secretary of the Interior and the Secretary of Agriculture shall update, develop (where necessary) and maintain on a continuing basis thereafter, an inventory of range conditions and record of trends of range conditions on the public rangelands, and shall categorize or identify such lands on the basis of the range conditions and trends thereof as they deem appropriate*."[39]

and,

> *"The Secretary shall manage the public rangelands in accordance with the Taylor Grazing Act (43 USC 315–315(o)), the Federal Land Policy and Management Act of 1976 (43 USC 1701–1782), and other applicable law consistent with the public rangelands improvement program pursuant to this chapter."* [40]

and,

> "*the goal of such management shall be to improve the range conditions of the public rangelands so that they become as productive as feasible in accordance with the rangeland management objectives established through the land use planning process, and consistent with the values and objectives listed in sections 1901(a) and (b)(2) of this title."*[41]

and,

> *"the above-mentioned conditions can be addressed and corrected by an intensive public rangelands maintenance, management, and improvement program involving significant increases in levels of rangeland management and improvement funding for multiple-use values;* [42]

Forty-two years of federal land use policy defines range improvements as taking place through **human intervention, practices, designs, and mechanistic means**. The federal range improvements doctrine dates back to the [repealed] Stock-raising Homestead Act (SRHA),[43] where the qualified stock "entryman" could be allocated up to 640 acres of unappropriated and unreserved federal lands in exchange for physical improvements to the land:[44]

> "*that instead of cultivation as required by the homestead laws the entryman shall be required to make permanent improvements upon the land entered."*[45]

---

39 43 USC § 1903. Rangelands inventory and management; public availability.

40 Ibid.

41 Ibid.

42 43 USC § 1901(a)(4) Congressional findings and declaration of policy.

43 43 USC § 291 et seq. The SRHA was repealed during enactment of the Federal Land Policy Management Act.

44 Ibid. Sec. 3 "*That instead of cultivation as required by the homestead laws the entryman shall be required to make permanent improvements upon the land entered before final proof is submitted tending to increase the value of the same for stock-raising purposes."*

45 43 USC § 291 et seq.

PRIA defines range development and improvement for the *"sixteen contiguous western states region"*[46] as consisting of active human improvement programs, human intervention, and construction of infrastructure:

> *"Fences, wells, reservoirs, and other improvements necessary to the care and management of the permitted livestock may be constructed on the public lands within such grazing districts under permit issued by the authority of the Secretary, or under such cooperative arrangement as the Secretary may approve*." [47]

and,

> *"The term range improvement means: any activity or program on or relating to rangelands which is designed to improve production of forage; change vegetative composition; control patterns of use; provide water; stabilize soil and water conditions; and provide habitat for livestock and wildlife. The term includes, but is not limited to, structures, treatment projects, and use of mechanical means to accomplish the desired results*." [48,49]

1.2.4 CVG Districts as Reservations Under the Federal Power Act of 1920

Within eight months of TGA enactment, Executive Orders 6910 and 6964 together withdrew all "*vacant, unreserved and unappropriated lands from settlement, location, sale or entry*," from the public domain, reserving vast regions of CVG districts for classification as *chiefly valuable for grazing*.

The construct of EO 6910 specifically incorporated the TGA language that CVG districts and lands be classified and administered for "*orderly use, improvement and development of such lands"* and "*stabilization of the livestock industry dependent upon the public range.*"

Section 3 of the Federal Power Act of June 1920 (FPA) defines *reservations* as *"lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws."* The FPA definition of "reservations," recognized through supreme court case law,[50,51] distinguishes only national monuments, national parks, and public lands from those lands withdrawn and reserved for a specific use:

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46 43 USC § 1902(a).

47 43 USC § 315c Fences, wells reservoirs and other improvements; construction; partition fences.

48 43 USC § 1902(f). Definitions. TGA section 315i**.** Disposition of moneys received; availability for improvements.

49 43 USC § 1702(k)(2) *"describe the type, location, ownership, and general specifications for the range improvements to be installed and maintained on the lands to meet the livestock grazing and other objectives of land management."*

50 *Escondido Mut. Water v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984)

51 FPC v. Tuscarora Indian Nation, 362 U.S. 99, 111 (1960)

> "*reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks*." [52]

Because CVG districts are neither national parks nor national monuments, and are not subject to private appropriation, they may not legitimately be classified as "public lands." This leaves only the category of "reservations," alongside of Wilderness Study Areas (WSAs), Areas of Critical Environmental Concern (ACECs), National Petroleum Reserve Lands (NPRLs) Wild and Scenic River Designations (WSRs) and other FPA-defined reservations.

It is noteworthy that while agency land use, forest, and resource management plans routinely include detailed maps and discussion of environmentally-related reservations, those same plans are deficient when it comes to incorporation of CVG district maps, geopolitical boundaries, or meaningful discussion of regions occupied by reserved CVG districts and lands. This general and collective omission, we believe, forms the basis for how agencies, academia, conservation organizations, or the public could misunderstand how reserved TGA districts must be prioritized and administered - including for landscape level rewilding.

The FPA definition of public lands remained fundamentally unchanged between 1920 and enactment of FLPMA in 1976, a conclusion affirmed in a 2001 opinion by the Solicitor of the Interior when evaluating whether public lands withdrawn by Executive Orders 6910 and 6964 are reservations for purposes of FPA:

> *"most enduringly public lands have been defined as those lands subject to sale and other disposal under the general land laws"*

and,

> *"Public lands" means such lands and interests in lands owned by the United States as are subject to private appropriations and disposal under public land laws. It shall not include "reservations" as hereinafter defined. "Reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in land owned by the United States and withdrawn, reserved or withheld from private appropriation and disposal under the public land laws..."* [53]

[52] 16 USC § 796(1),(2) Definitions.

[53] Federal Power Act. 41 Stat 1063. (1920) codified at 16 USC § 791a et seq.

and,

> *"Although the story is complex in its details, as discussed in the next few paragraphs, the bottom line for purposes of the legal question before me is simple: TGA lands are "withdrawn, reserved or withheld from private appropriation and disposal under the public land laws" in terms that fit the definition of "reservations" in the FPA." 16 USC § 796(2).*[54] (Appendix F)

This led to the definition of public lands in FLPMA:

> *"The term "public lands" means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except–*
>
> > *(1) lands located on the Outer Continental Shelf; and,*
> >
> > *(2) lands held for the benefit of Indians, Aleuts, and Eskimos"*[55]

1.2.5 CVG Districts and Administration of the Charles M. Russell Wildlife Refuge

On December 14, 1936, President Roosevelt signed into law Executive Order 7509,[56] a mandate that created the Fort Peck Game Range (FPGR) through reclassification of EO 6910 lands reserved within Montana CVG districts 1, 2, and 6 (Appendices A and B).

EO 7509 recognized the presence of the CVG districts, provided for joint administration of FPGR by the Secretaries of Interior and Agriculture, and established numerical maximum populations for 400,000 sharptail grouse, 1,500 antelope, and "*such nonpredatory secondary species in such numbers as may be necessary to maintain a balanced wildlife population*."

The construct of EO 7509 - still in effect - establishes a multiple-use hierarchy favoring grouse and antelope - the "*primary species*" - when administering FPGR for purposes of allocating range forage. Once a healthy, balanced range condition has been achieved and numerical thresholds of the *primary species* have been met, the unambiguous language of EO 7509 requires the secretary of interior to administrate the FPGR such that domestic livestock has equal access to forage resources of the range:

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54 Memorandum M-37005. *Whether Public Lands Withdrawn by Executive Orders 6910 and 6964 or Established as Grazing Districts are "Reservations" within the Meaning of Section 4(e) of the Federal Power Act* (Jan. 9, 2001). Solicitor of the Interior. January 19, 2001.

55 43 USC § 1702(e).

56 Executive Order 7509, Establishing the Fort Peck Game Range, Montana. December 14, 1936.

> *"By virtue of and pursuant to the authority vested in me as President of the United States…it is ordered that the following-described lands, insofar as title thereto is in the United States, be, and they are hereby, withdrawn from settlement, location, sale, or entry and reserved and set apart for the conservation and development of natural wildlife resources and for the protection and improvement of public grazing lands and natural forage resources*:"

and,

> *This range or preserve, insofar as it relates to conservation and development of wildlife, shall be under the Joint jurisdiction of the secretaries of the Interior and Agriculture, end they shall have power jointly to make such rules and regulations for its protection, administration, regulation, and improvement, and for the removal and disposition of surplus game animals, as they may deem necessary to accomplish its purposes, and the range or preserve, being within grazing districts duly established pursuant to the provisions of the act of June 28, 1934, ch. 865, 48 Stat. 1269, as amended by the act of June 26, 1936, Public Law No, 827, 74th Congress, shall be under the exclusive Jurisdiction of the Secretary of the Interior, so far as it relates to the public grazing lands and natural forage resources thereof."*

and,

> *Provided, however, that the natural forage resources therein shall be first utilized for the purpose of sustaining in a healthy condition a maximum of four hundred thousand (400,000) sharptail grouse, and one thousand five hundred (1,500) antelope, the primary species, and such nonpredatory secondary species in such numbers as may be necessary to maintain a balanced wildlife population, but in no case shall the consumption of forage by the combined population of the wildlife species be allowed to increase the burden of the range dedicated to the primary species: Provided further that all the forage resources within this range or preserve shall be available, except as herein otherwise provided with respect to wildlife, for domestic livestock under rules and regulations promulgated by the Secretary of the Interior under the authority of the aforesaid act of June 26, 1934, as amended."*

On April 13, 1942, President Roosevelt signed Executive Order 9132, which reclassified 7,474 acres of lands withdrawn under Executive Orders 6910 and 7509 for use by the War Department (US Army Corps of Engineers) during construction and operation of Fort Peck Dam and Reservoir. EO 9132 specifically references, as did EO 7509, the coordinates for CVG districts 1, 2 and 6 using US Geological Survey Section, Township, and Range cadastral system and datum (Appendix B).

EO 6964 expressly reiterates the range protection and improvement language from TGA, and the dual purpose for which the FPGR is to be managed:

> *"The public lands affected by this order, situated in Montana Grazing Districts Nos. 1, 2, and 6 created by Departmental Orders of July 11, 1935, and October 4, 1939, will remain under the jurisdiction and administration of the Secretary of the Interior for the conservation and development of natural wildlife resources and for the protection and improvement of public grazing lands and natural forage resources, as provided by Executive Order No. 7509 of December 11, 1936."*

On October 15, 1966, Congress enacted the National Wildlife Refuge System Administration Act (NWRS),[57] legislation that was amended in 1977.[58] The organic NWRS act consolidated into a single system federal authorities and administration of lands to be managed for wildlife conservation and refuge purposes. For its part, the 1977 amendment to NWRS[59] and Secretarial Public Land Order 5635 transferred responsibility for the Charles M. Russell Wildlife Refuge (CMR) from joint BLM/FWS management to exclusive administration under the Director of US Fish and Wildlife Service. In amending the NWRS, the congressional record left intact the organic language and dual purposes from TGA, EO 7509, and decades of joint FPGR/CMR management.

Section 2 of the 1966 NWRS act provides for the national wildlife refuge system to be administrated in accordance with a statutorily-defined *mission*, and Section (a)(3)(A) of NWRS imposes the obligation on the Director of US Fish and Wildlife Service to understand and administer individual wildlife refuges consistent with the *specific purpose* for which each refuge was established.

The "*specific purpose"* language was retained in future NWRS amendments,[60] imposing the obligation upon the Secretary of the Interior and Director of Fish and Wildlife Service to understand the original intent for which each refuge was established, and ensure that refuge management plans and processes include that purpose:

> *(2) "The mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.*
>
> *(3) With respect to the System, it is the policy of the United States that -*
>
> > *(A) each refuge shall be managed to fulfill the mission of the System, as well as the specific purposes for which that refuge was established.*[61] *"*

[57] 16 USC § 668dd National Wildlife Refuge System Administration Act of 1966. PL 89-669. 80 Stat. 927. October 15, 1966.
[58] Pub. L. 105-57
[59] Ibid. Pub. L. 105-57
[60] National Wildlife Refuge System Improvement Act of 1997. Sec. 5 (a)(A). Pub. L. 105-57. October 9, 1997.
[61] 16 USC § 668dd (2),(3)

On October 9, 1997, through the National Wildlife Refuge System Improvement Act, the organic NWRS was amended to include provisions for conservation planning, expanded, wildlife-dependent recreational use, and a renewed priority that ensures "*priority public uses receive enhanced attention in planning and management within the Refuge System.*"

In Schwenke v. Secretary of the Interior[62] the 9th Circuit court of appeals decided two questions with respect to the wildlife and domestic livestock priority system enacted under EO 7509. First, the 9th Circuit concluded that EO 7509 had neither been modified nor revoked by NWRS, meaning that the administrative priority scheme and numerical thresholds enacted under EO 7509 were not superseded by NWRS or its amendment, PL 94-223. According to the 9th Circuit, the purposes of the CVG district system and Taylor Grazing Act, as incorporated in EO 7509, remain binding upon FWS as part of its administration of the CMR:

> *"Were we to consider only the statute, read in light of its legislative history, we would rule that P.L. 94-223 commands that wildlife have priority in access to the forage resources of the Range and that the Range is to be administered under the Wildlife Refuge Act. We cannot consider the statute alone, however, for in determining its effect we must not only determine the meaning of P.L. 94-223 but must also determine whether the statute effectively revoked the contrary commands of E.O. 7509.*
>
> *It is the law of our circuit that revocation or modification of an existing withdrawal should be express to be effective…We believe, given this rule, the priority scheme established by E.O. 7509 has not been revoked. Nowhere in the 1976 Amendments is anything said about priority in access to the forage resources of the Range. There is simply no mention of livestock, grazing, or E.O. 7509." Furthermore, the legislative history on this point is more indicative of confusion regarding the existing priority scheme than of an intent to change priorities. Many legislators seemed to think E.O. 7509 had established an absolute wildlife priority. Such confusion is not sufficient to revoke E.O. 7509. We thus hold that P.L. 94-223 did not revoke the priority scheme for access to the resources of the Range established by E.O. 7509."*

With respect to administration of the CMR under amendments to the National Wildlife Improvement Act, the 9th Circuit ruled that it was the intent of congress for administration of the CMR to be transferred to exclusive management under the Fish and Wildlife Service:

> *"While the language of P.L. 94-223 does not explicitly change administration of the Range from the Taylor Grazing Act to the Wildlife Refuge Act, when the statute is read in conjunction with its legislative history the intention to change Range management to the Wildlife Refuge Act is clear."*

[62] 720 F.2d 571 (9th Cir. 1983).

The 9th Circuit also qualified that administration of wildlife refuges under NWRS was not to "*impinge*" upon other land use values. This is a clear recognition that the dual purposes enacted under EO 7509 - and by extension those of TGA - were to be preserved throughout refuge management and administration processes:

> *"[I]t is the legislative intent, so far as this bill is concerned, that the Fish and Wildlife Service will continue to manage these ranges to be utilized to whatever extent possible for other uses besides preservation of the fish and wildlife, so long as it does not impinge upon it and make it impossible to preserve those values."*

In recognizing the dual, multiple land use purposes of the CMR for both wildlife and domestic livestock grazing, the 9th Circuit applied the maximum threshold priority for sharptail grouse and antelope in a context that negates exclusive management of the CMR for wildlife-only purposes:

> *"Neither the ranchers' nor the Secretary's position, however, is ultimately convincing. The ranchers' position--that grazing, and wildlife preservation enjoy equal status on the Range--altogether ignores the language commanding that the resources of the Range shall be "first utilized" for the support of certain types of wildlife. The argument of the Secretary--that wildlife has absolute priority on the Range--ignores forty years of administration of the Range by the Fish and Wildlife Service and the Bureau of Land Management. It also ignores the language of the order itself. E.O. 7509 refers to a "maximum " of 400,000 sharptail grouse and 1500 antelope. Had an absolute wildlife priority been intended, it is hard to see why such limits were established.*

2.0 LEGAL AND ADMINISTRATIVE ISSUES

2.1 Legal Questions Raised -

Question 1 - Whether the Secretary of the Interior is erring through premature conduct of NEPA EA processes for the APR change-in-use applications before receiving a multiple use compatibility analysis with domestic livestock, or having assessed consistency with Fergus, Valley, Phillips or other county land use plans and processes.

Response 1 - Yes. The Secretary of Interior has erred. The Secretary should have conducted a multiple use compatibility analysis of bison with domestic livestock and initiated a consistency review of land use plans by local governments prior to contracting Environmental Management and Planning Solutions, Inc. (EMPSi) to perform a NEPA EA for BLM.

Question 2 - Whether the specific purpose for improvement of public lands reserved as chiefly valuable for grazing under EO 6910 and 7509, for which the CMR is to be administered under 16 USC § 668(dd)(a)(3)(A) and Sec. 5 (a)(3) of the Pub. L. 105-57, have been adequately incorporated in the July 2012 CMR Comprehensive Plan.

Response 2 - No. The July 2012 CMR Comprehensive Plan does not adequately incorporate the specific purpose for improvement of public lands reserved as chiefly valuable for grazing under EO 6910 and 7509, for which the CMR is to be administered under 16 USC § 668(dd)(a)(3)(A) and Sec. 5 (a)(3)(A) of the Pub. L. 105-57.

Question 3 - Whether the administrative procedures, which normally require public notice and opportunity to be heard, being used by the Director of US Fish and Wildlife Service to retire Chiefly Valuable for Grazing allotments, districts or leases in the CMR are sufficient for county governments to understand, assess, and respond to the land use, economic, boundary, or other potential impacts within their jurisdictions.

Response 3 - No. The USFWS Director's administrative procedures have not provided meaningful public notice nor a reasonable opportunity to be heard by county governments. In light of the clash between decisions by federal agencies and the county land use plans, the counties need adequate notice and processes to understand, assess, and respond to the land use, economic, boundary, or other potential impacts of the federal agency decision-making within their jurisdictions.

2.2 Administrative Issues Raised -

Question 4 - Whether designation of Wilderness Study Areas, Areas of Critical Environmental Concern, Wild and Scenic Rivers, or other land withdrawals by local BLM or USFS offices within lands previously reserved for Chiefly Valuable for Grazing purposes present statutory, administrative or land use conflicts.

Response 4 - Yes. The federal designations of Wilderness Study Areas, Areas of Critical Environmental Concern, Wild and Scenic Rivers, and other land withdrawals by local BLM or USFS offices within lands previously reserved for Chiefly Valuable for Grazing purposes presents statutory, administrative and land use conflicts.

Question 5 - Whether the range improvement, range management, orderly-use, tax, and domestic livestock industry protection purposes codified throughout the Taylor Grazing Act, the Federal Land Policy Management Act, the Public Rangelands Improvement Act and multiple executive orders have been thwarted by the Secretaries of Interior and Agriculture by not incorporating CVG district boundary maps, principles, and history in land, forest, and resource management plans and administrative processes.

Response 5 - Yes. By the Secretaries of Interior and Agriculture not incorporating CVG district boundary maps, principles, and history in land, forest, and resource management plans into their administrative processes, the range improvement, range management, orderly-use, tax, and domestic livestock industry protection purposes codified throughout the Taylor Grazing Act, the Federal Land Policy Management Act, the Public Rangelands Improvement Act and multiple executive orders have been thwarted.

2.3 Litigation Issues Raised for Future Reporting -

Question 6 - Whether Fergus, Valley, and Phillips Counties or other proximate MtNRC counties have standing - that is, legally sufficient injury-in-fact to satisfy the U.S. Constitution's, Article III case or controversy requirement - to sue federal agencies based on decisions that interfere with the land use plans and processes of the respective counties.

Response 6 - Yes. Counties have standing if they can show an injury-in-fact based on federal agency interference with their land use plans and processes. Standing has been found for: 1) Several counties in Washington to attack the constitutionality of a statute that restricted the export of unprocessed timber harvested on state public lands; 2) A county had standing to challenge FWS's alleged failure to comply with NEPA in designation of critical habitat under the ESA as a result of the alleged resulting adverse impact on property owned by the county; 3) a quasi-municipal corporation established for the purpose of conserving water within a water conservancy district to maximize beneficial uses of water within the district, and, 4) for a California county to assert NEPA and CAA violations in connection with the Secretary of Interior's approval of agreements by water districts serving urban areas in southern California based on the adverse consequences to the county of CAA violations alleged to result from the agreement and the interference with the county's land management efforts.

Question 7 - Whether Fergus, Valley and Phillips Counties or other proximate counties have a private cause of action to sue the federal agencies based upon agency decisions that interfere with the land use plans and planning prerogatives of the respective counties.

Response 7 - Yes. The Counties may assert NEPA and APA violations by the federal agencies. As example, the Secretaries of Interior and Agriculture, by not incorporating CVG district boundary maps, principles, and history in land and resource management plans into their administrative processes, have thwarted the range improvement, range management, orderly-use, tax, and domestic livestock industry protection purposes codified throughout the Taylor Grazing Act, the Federal Land Policy Management Act, the Public Rangelands Improvement Act and multiple executive orders - causing concrete injury to the respective counties.

3.0 CONFLICTS ASSESSMENT; FINDINGS

I. The Secretaries of the Interior and Agriculture have a statutory obligation to protect chiefly valuable for grazing district reservations, boundaries, uses, privileges, access, and the principal use of domestic livestock grazing:

a. CVG districts are withdrawn and reserved for a specified, *chiefly valuable for grazing* use classification under Section 3 of the Federal Power Act;

b. CVG districts are not subject to private appropriation and disposal;

c. Under TGA, FLPMA, and PRIA, CVG districts are set aside for principal grazing of domestic livestock use - privileges over which the Secretaries of the Interior and Agriculture have a responsibility to "*adequately safeguard*;"

d. CVG districts located throughout the national forests and BLM lands have longstanding, mapped, and often predating geopolitical boundaries;

e. The TGA mandates that no other designations, withdrawals, or reservations may be superimposed over CVG district reservations, except with the approval of the secretaries of the Interior or Agriculture: "*Provided, that no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department…*"[63]

f. The Federal Land Policy Management Act and Department of the Interior policy manuals are unambiguous that authority for making land withdrawals rests exclusively with the Secretary of the Interior or the Assistant Secretary, Minerals Management, both who must be appointed by the President with confirmation by the U.S. Senate: *"The Secretary may delegate this withdrawal authority only to individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate."*[64,65]

g. Local or state Bureau of Land Management offices lack a distinct line of statutory authority to impose land withdrawals, designations, or reservations within CVG district boundaries without a record of decision (ROD) or explicit concurrence by the office of the Secretary of the Interior.

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63 43 USC § 315a

64 43 USC § 1714(a)

65 209 DM 7.1 B

h. The Chief of the US Forest Service is required to maintain *convenient* access to CVG districts for stock driving purposes within the national forest system and wilderness areas:

> *"Whenever any grazing district is established pursuant to this subchapter, the Secretary shall grant to owners of land adjacent to such district, upon application of any such owner, such rights-of-way over the lands included in such district for stock-driving purposes as may be necessary for the convenient access…."*

and,

> *Within wilderness areas in the national forests designated by this chapter, and… (2) the grazing of livestock, where established prior to September 3, 1964, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture.*[66,67]

II. Rewilding initiatives that propose to deconstruct fencing, wells, stock reservoirs, structures, or other improvements are in direct conflict with range development, orderly use, and industry stabilization objectives defined in TGA and PRIA:

a. *"Fences, wells, reservoirs, structures, treatment projects and mechanical means"* are defined in TGA and PRIA as constituting rangeland improvements.

b. Deconstruction of range improvements is contrary to the TGA Section 315a principals that the Secretaries of the Interior and Agriculture protect and improve CVG districts:

> "*shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of section 315 of this title..."*

c. Removal and deconstruction of fencing inhibits seasonal rotation, negates opportunities for land rest, and transitions CVG districts to singular, dominant wildlife-only land use.

d. In 2012, the World Wildlife Fund and American Prairie Foundation sponsored a hydrological study of the benefits of stock pond and dam removal across BLM, CMR, and APR fee lands:

66 16 USC § 1133(d)(4)(2)

67 36 CFR § 293.7. Grazing of livestock in wilderness areas.

> *"The Box Elder Watershed was chosen as the study site for an investigation into stock pond effects partly because it has a large percentage of land set aside for wildlife management. Currently 81% of Box Elder is either deeded to the American Prairie Foundation (APF) or managed by it through blocks leased from the Bureau of Land Management (BLM) or controlled by the CMR National Wildlife Refuge*."

and,

> *Finally, the ponds on Box Elder Watershed were ranked in a single list according to their influence on peak discharge and runoff volume. The list will help to prioritize the ponds on Box Elder Watershed for removal since cost and animal water requirements will prevent the removal of all ponds*."[68]

Another study documents removal of three dams from Telegraph Creek, a dam on Third Creek, and structure modifications to a dam on Box Elder Creek:

> *In 2007, APR removed three dams in the Telegraph Creek basin with the hope of restoring stream functionality and connectivity. These habitat alteration projects included removing a dam on Third Creek, an irrigation structure modification on Box Elder Creek, and the replacement of an earthen dam on Telegraph Creek with a check dam.*[69]

The dam removal report and the hydrological thesis are silent as to the potential environmental effects or conflicts with the PRIA watershed protection objectives that could result from increased silt loading to the Fort Peck Reservoir as a result of stock pond removal:

> *(a) "The Congress finds and declares that…*
>
> *(3) "unsatisfactory conditions on public rangelands present a high risk of soil loss, desertification, and a resultant underproductivity for large acreages of the public lands; contribute significantly to unacceptable levels of siltation and salinity in major western watersheds including the Colorado River;"*[70]

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[68] Thesis, Master of Science. *Evaluation of The Hydrologic Effects of Stock Ponds on a Prairie Watershed*. Jennifer Marie Womack. April 2012.

[69] *Recolonization of Fish in the Telegraph Creek Basin: An assessment of barrier removals and habitat improvements*. K. Ostovar Rocky Mountain College. November 2012.

[70] 43 USC § 1901(a)(3). Congressional findings and declaration of policy.

III. Rewilding initiatives that propose to modify CVG district boundaries or retire TGA grazing leases or allotments require the Secretary of the Interior to perform a chiefly valuable for grazing determination:

a. The Secretary of the Interior is obligated to perform a chiefly valuable for grazing determination (CVGD) whenever an administrative action establishes, modifies, or affects a grazing district boundary, or when grazing permits or leases within a CVG district are retired.

b. TGA factors to be considered in CVG districts are the disruptive effect boundary changes may have on adjacent leases or allotments; distribution of revenues to state or local governments; the effect on the local livestock industry; and whether rangeland health can be maintained absent ongoing improvement and development of CVG districts.

c. TGA and PRIA both recognize that range development and orderly use will result in the betterment of forage conditions, improved watershed protection, and increased livestock production.

d. Rewilding initiatives in general, and those posed by APR, propose removal of fences, stock reservoirs, and dam structures, all of which constitute removal of federally-owned, taxpayer funded, range development improvements.

e. Change in livestock permits proposed by APR request transition of CVD District #6 grazing lands from the FLPMA principal use for domestic livestock grazing of cattle to dominant use for indigenous-animal grazing by bison.

IV. The range of authority of Secretary of the Interior to permit rewilding initiatives for grazing of indigenous animals on CVG district lands is limited to: 1) domestic livestock; 2) grazing of indigenous animals following demonstration of compliance with multiple use principles; or 3) secretarial withdrawal of lands for indigenous animal use:

a. Under TGA and implementing federal range management regulations, bison or other indigenous animals are not "cattle, sheep, horses, burros, or goats," and cannot be classified as "*domestic livestock*," "*kind of livestock*," or "*species of domestic livestock"* under 43 CFR § 4100.0-5.

b. BLM regulations allow grazing of private bison, wildlife, or indigenous animal herds to be permitted on CVG districts under its Special Grazing and Lease Regulations at 43 CFR § 4130.6-4 after a demonstration of multiple use compatibility with other principal uses and consistency with county land use plans:

> *"Special grazing permits or leases authorizing grazing use by privately owned or controlled indigenous animals may be issued at the discretion of the authorized officer. This use shall be consistent with multiple-use objectives. These permits or leases shall be issued for a term deemed appropriate by the authorized officer not to exceed 10 years."*

c. Special grazing permits or leases are revocable and subordinate to domestic livestock grazing permits in that they have no priority for renewal and cannot be transferred or assigned to another party. They are discretionary on the part of the local official with delegated authority for granting permits and leases. Regulations at 43 CFR § 4130.6-4 cannot legitimately be read separately from the regulations at 43 CFR § 4130.6:

> *"Special grazing permits or leases authorizing grazing use by privately owned or controlled indigenous animals may be issued at the discretion of the authorized officer. This use shall be consistent with multiple-use objectives. These permits or leases shall be issued for a term deemed appropriate by the authorized officer not to exceed 10 years."*

d. In the 2006 final rulemaking precedent for grazing administration, the Secretary of the Interior declined to assign bison domestic livestock grazing preference on CVG districts, affirming that grazing permits for bison may only be issued under the *Special Grazing Permits and Leases Regulations* at 43 CFR § 4130.6-4.[71] (Appendix G)

e. The statutory mechanism to achieve the orderly use, land development, and range improvement *"objects*" defined in TGA and PRIA is through active, human induced, construction of *fencing, structures,* and *mechanical means and treatment projects*.

f. Rewilding initiatives that propose to remove fencing, structures, roads, dams or other structures defined as "*improvements*" on CVG districts are contrary to controlling statutory and administrative mandates.

g. Deconstruction of fencing, structures, roads, stock ponds dams and/or other improvements transitions CVG districts from multiple to dominant use, ultimately resulting in the exclusion of other FLPMA, principal-use values.

[71] Final Rule. FR Vol. 71, No. 133. *Grazing Administration—Exclusive of Alaska.* July 12, 2006. page 39447.

h. Rewilding initiatives that could impact CVG district or lease allotment boundaries require the Secretary of the Interior to perform and adopt into land use plans a *chiefly valuable for grazing determination*.

i. Bison change in livestock proposals by the American Prairie Reserve for the *Starve Out Flat* and *Deadman Coulee* BLM grazing lands west of the TGA District 6 boundary at Arrow Creek, and the boundary where the Two-Crow Ranch meets the Charles M. Russell National Wildlife Refuge, likely present boundary conflicts requiring a CVG determination.

V. The Secretary of the Interior and Director, US Fish and Wildlife Service do not have the discretion to administrate the Charles M. Russell Wildlife Refuge apart from the purposes established for the Fort Peck Game Range by Executive Order 7509, and the underlying Taylor Grazing Act:

a. The National Wildlife Refuge System Administration Act of 1966,[72] and amendments thereto,[73] require as a matter of policy that individual wildlife refuges "*shall be managed to fulfill the mission of the System, as well as the specific purposes for which that refuge was established;"*

b. Relevant case law affirms the applicability of Executive Order 7509, and recognizes that Montana CVG districts 1, 2, and 6 within the CMR are first to be managed in accordance with a numerical priority system for sharptail grouse and antelope, then nonpredatory secondary species to achieve a balanced wildlife population, and then for "*protection and improvement of public grazing lands"* for domestic livestock.

c. The hierarchy established under Executive Order 7509 places an administrative burden on the Director, US Fish and Wildlife Service to prioritize forage for grazing of domestic livestock in the CMR above restoration, conservation or free movement of wild bison described by the Director in the *Ecological Processes Emphasis Alternative* of the Record of Decision for the 2012 Comprehensive Conservation Plan.[74,75]

d. Since the transition of the FPGR (CMR) to exclusive administration under the Director, US Fish and Wildlife Service, the Director has neglected to manage Montana CVG districts 1, 2, and 6 to ensure the protection and improvement of reserved public grazing lands after threshold populations of the primary specie populations have been met.

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[72] 16 USC § 668dd National Wildlife Refuge System Administration Act of 1966. PL 89-669. 80 Stat. 927. October 15, 1966.

[73] Pub. L. 94-223, 90 Stat. 199 (codified at 16 USC. Sec. 668dd (February 27, 1976)).

[74] *Federal Register* / Vol. 72, No. 232 / Tuesday, December 4, 2007 / Notices.

[75] *Record of Decision for the Final Comprehensive Conservation Plan and Environmental Impact Statement — Charles M. Russell National Wildlife Refuge — UL Bend National Wildlife Refuge.*

VI. The 2012 Comprehensive Conservation Plan and Record of Decision for the Charles M. Russell Wildlife Refuge insufficiently administers the purpose for which the Fort Peck Game Range was established, inappropriately administers access to forage for grazing of domestic livestock, and is deficient in its protection of CVG Districts and county governments:

a. The July 12, 2012 Record of Decision (ROD) for the Comprehensive Conservation Plan strategically omits key phrases of the purposes of which Executive Order 7509 was established.

b. The prescription grazing and interfamilial permit transfer policies of the US Fish and Wildlife Service are not consistent with the historical range protection, range improvement and forage hierarchy established for the Fort Peck Game Range.

c. The forage hierarchy in EO 7509 remains an integral an applicable part of the purpose for which the CMR is to be managed (Appendices G, H).

d. Neither the administrative record or Record of Decision for the July, 2012 Comprehensive Conservation Plan and Environmental Impact Statement for the CMR contain geopolitical maps, notifications, protocol, nor any discussion of the Chiefly Valuable for Grazing Determination requirements identified by the Solicitor in 2003 that pertain to retirement of grazing allotments and districts on Federal lands.

e. There is no indication in federal or county land use plans or the Comprehensive Conservation Plan for the CMR that the Director of US Fish and Wildlife Service has assessed the disruptive effect to remaining allotments, evaluated the impact on county revenues, nor considered disruptions to the domestic livestock industry a result of her ongoing, prescription grazing allotment retirement policy.

f. Land Use Plans by Federal agencies and Fergus, Valley and Phillips county governments and the public record are silent as to whether the Chiefly Valuable for Grazing Determinations required for retirement of grazing allotments/districts have been prepared by the US Fish and Wildlife Service.

g. The public record is silent as to how US Fish and Wildlife Service has been fulfilling its notification obligations to county governments so they may meaningfully participate in land use planning processes during retirement of grazing allotments/districts within the CMR.

h. The public record is silent as to how US Fish and Wildlife Service has quantified the disruptive effects to county governments from reapportionment of the 12.5 percent TGA grazing revenues resulting from retirement of grazing allotments and districts in the CMR.

4.0 RECOMMENDATIONS

Since the mid-1970s, the congressional intent behind CVG districts has become increasingly blurred, diminished, or in some cases lost to environmental land use values during land use planning processes. This situation is traced to increasingly disaggregated and nonuniform agency policies, driven over time by competing philosophies of various administrations. The result of this condition is that agency staff at the local or regional offices have been forced - or enabled - through land use planning processes to establish their own priorities, some of which are at cross-purposes to TGA, PRIA and FLPMA.

Integral to the TGA philosophy and replete throughout land use statutes, policies, and longstanding practices of the United States is the theme that improvements on marginal CVG district lands are to be active, interventive, human based, and aimed at maximizing productivity in context of reasonable protection for natural resources, the domestic livestock industry, local economies, and county prerogatives.

Repurposing of CVG districts for wildlife rewilding is not contemplated by the CVG district classification system nor the Public Rangelands Improvement Act and local offices of administrative agencies cannot be delegated congressional or secretarial authority to repurpose vast regions of districts reserved for Chiefly Valuable for Grazing use without significant administrative actions.[76]

We respectfully propose to the President of the United States that he create a temporary, cabinet-level committee whose purpose and charter is to obtain from the US Senate, National Archives, or affected federal agencies the original, geopolitically bounded, cadastrally surveyed, CVG district maps covered by Executive Orders 6910, 6964, 7509 and subsequent land withdrawals.

The proposed committee would use the inventory authority granted under 43 USC 1711 through 43 USC 1714, 43 USC 1903, and other statutory law to incorporate as addenda official maps of the reserved CVG districts in land use, forest, wilderness, or resource management plans host to each respective CVG district. Conflicts with reserved CVG districts or lands resulting from post TGA agency actions, if any, would be resolved by the Secretaries on a case-by-case basis.

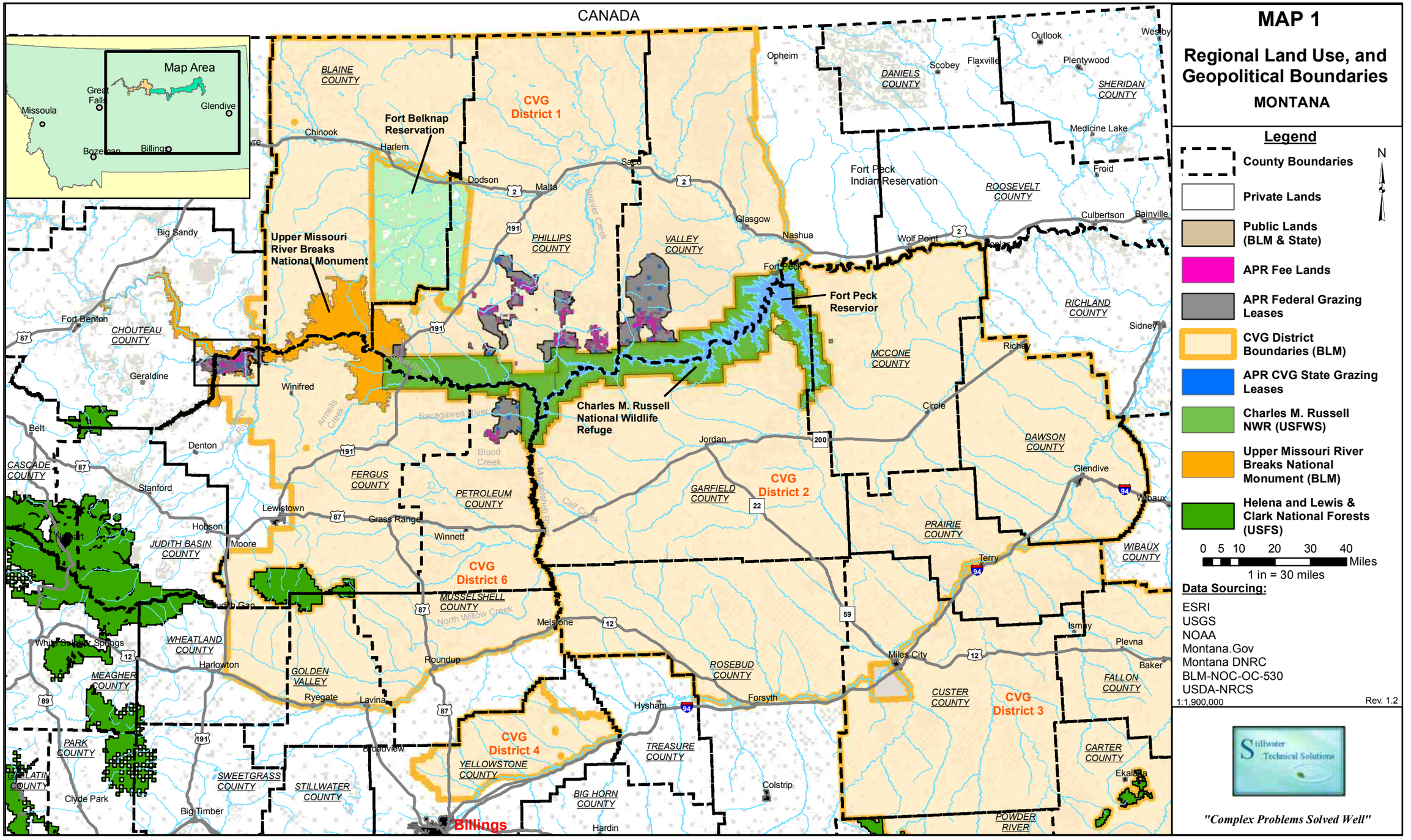
We also propose the Secretary of the Interior, through the Director, US Fish and Wildlife Service consider revising the 2012 Comprehensive Conservation Plan for the Charles M. Russell National Wildlife Refuge and Record of Decision to be administered according the purposes for which the Fort Peck Game Range was established in Executive Order 6910, Executive Order 7509, and 16 USC § 668(dd)(a)(3)(A) of the National Wildlife Refuge System Administration Act of 1966.

[76] *Comments, Statutory Analysis and Recommendations on BLMs Planning 2.0 Rule*. Stillwater Technical Solutions. OMB Control No. 1004-XXX. Comment Tracking Number 1k0-ptz-3c0o. May 25, 2016.

Appendix A

Maps

Map 1: Regional Land Use and Geopolitical Jurisdictions
Map 2: Federal CVG Districts and State Grazing Leases
Map 3: CVG Boundary Conflicts at PN Ranch



MAP 1

Regional Land Use, and Geopolitical Boundaries

MONTANA

Legend

- County Boundaries
- Private Lands
- Public Lands (BLM & State)
- APR Fee Lands
- APR Federal Grazing Leases
- CVG District Boundaries (BLM)
- APR CVG State Grazing Leases
- Charles M. Russell NWR (USFWS)
- Upper Missouri River Breaks National Monument (BLM)
- Helena and Lewis & Clark National Forests (USFS)

N

0 5 10 20 30 40 Miles

1 in = 30 miles

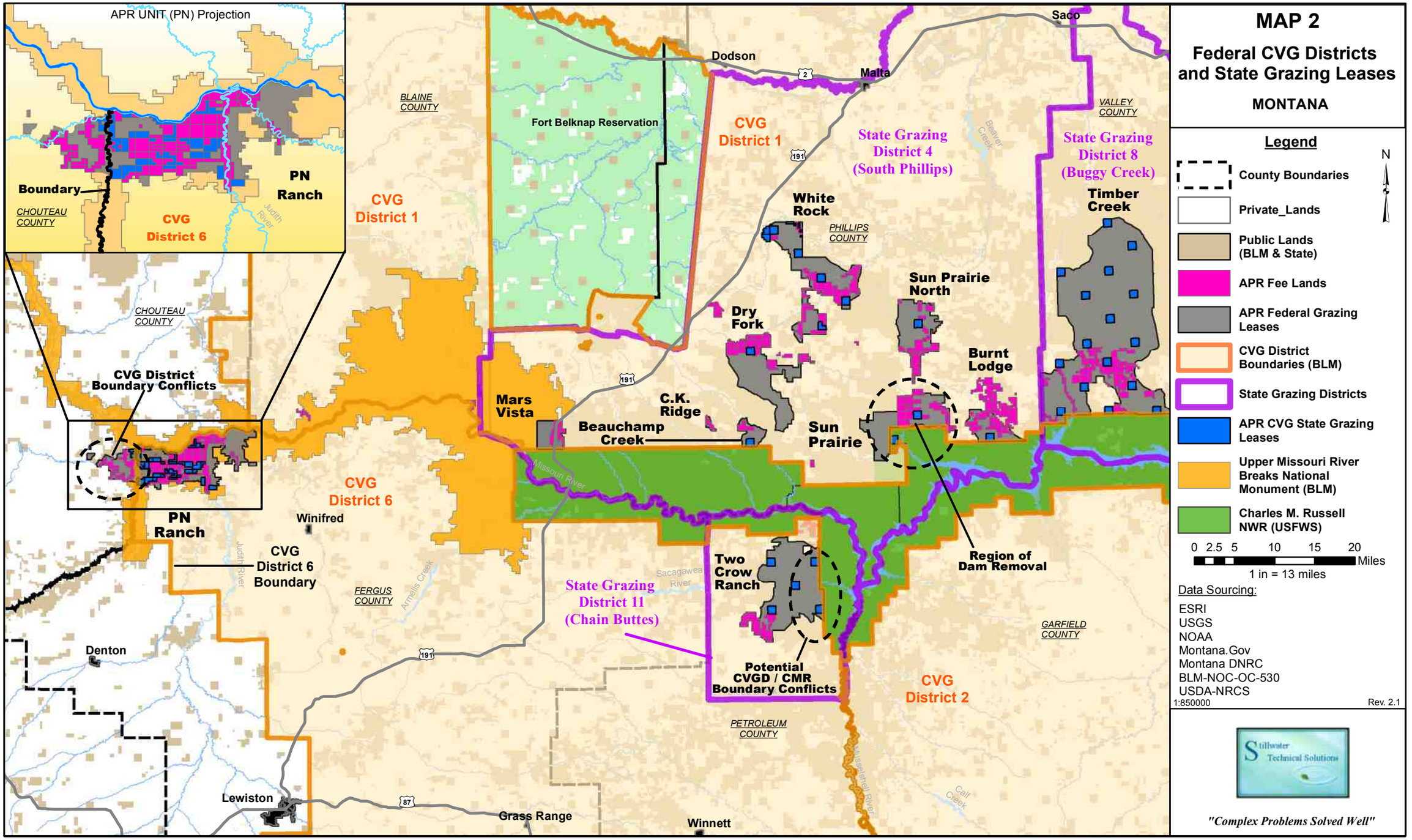
Data Sourcing:

ESRI
USGS
NOAA
Montana.Gov
Montana DNRC
BLM-NOC-OC-530
USDA-NRCS

1:1,900,000 Rev. 1.2

Stillwater Technical Solutions

"Complex Problems Solved Well"



MAP 2

Federal CVG Districts and State Grazing Leases

MONTANA

Legend

- County Boundaries
- Private_Lands
- Public Lands (BLM & State)
- APR Fee Lands
- APR Federal Grazing Leases
- CVG District Boundaries (BLM)
- State Grazing Districts
- APR CVG State Grazing Leases
- Upper Missouri River Breaks National Monument (BLM)
- Charles M. Russell NWR (USFWS)

N

0 2.5 5 10 15 20 Miles

1 in = 13 miles

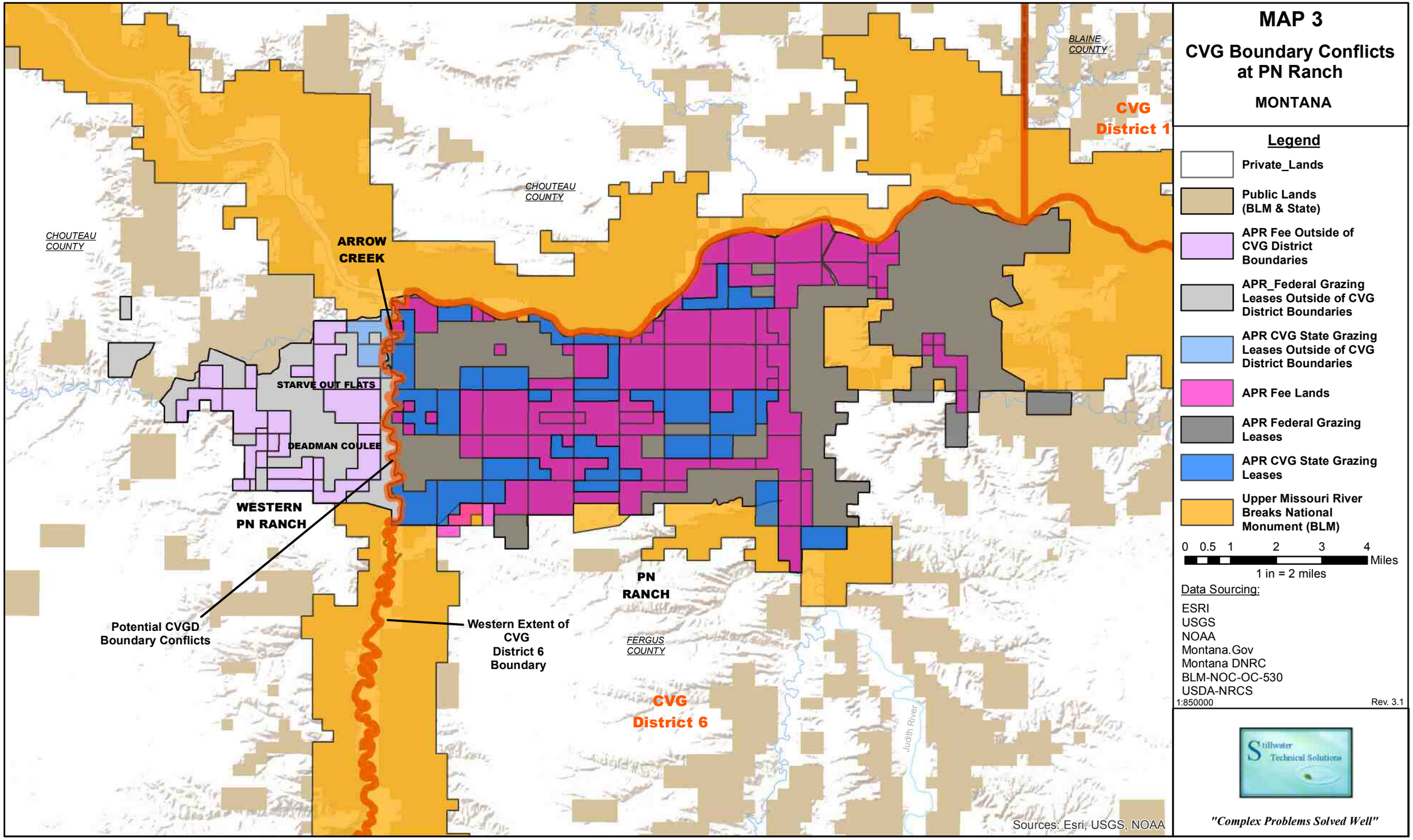
Data Sourcing:

ESRI
USGS
NOAA
Montana.Gov
Montana DNRC
BLM-NOC-OC-530
USDA-NRCS

1:850000 Rev. 2.1

Stillwater Technical Solutions

"Complex Problems Solved Well"


MAP 3
CVG Boundary Conflicts at PN Ranch
MONTANA
Legend
Private_Lands
Public Lands (BLM & State)
APR Fee Outside of CVG District Boundaries
APR_Federal Grazing Leases Outside of CVG District Boundaries
APR CVG State Grazing Leases Outside of CVG District Boundaries
APR Fee Lands
APR Federal Grazing Leases
APR CVG State Grazing Leases
Upper Missouri River Breaks National Monument (BLM)
0 0.5 1 2 3 4 Miles
1 in = 2 miles
Data Sourcing:
ESRI
USGS
NOAA
Montana.Gov
Montana DNRC
BLM-NOC-OC-530
USDA-NRCS
1:850000
Rev. 3.1
BLAINE COUNTY
CVG District 1
CHOUTEAU COUNTY
CHOUTEAU COUNTY
ARROW CREEK
STARVE OUT FLATS
DEADMAN COULEE
WESTERN PN RANCH
PN RANCH
Potential CVGD Boundary Conflicts
Western Extent of CVG District 6 Boundary
FERGUS COUNTY
CVG District 6
Judith River
Sources: Esri, USGS, NOAA
Stillwater Technical Solutions
"Complex Problems Solved Well"

Appendix B

FDR Executive Order 6910 - January 28, 1934
FDR Executive Order 6964 - February 2, 1935
FDR Executive Order 7509 - December 14, 1936
FDR Executive Order 9132 - April 16, 1942

EXECUTIVE ORDER

WITHDRAWAL FOR CLASSIFICATION OF
ALL PUBLIC LAND IN CERTAIN STATES

WHEREAS, the act of June 28, 1934 (ch. 865, 48 Stat. 1269), provides, among other things, for the prevention of injury to the public grazing lands by overgrazing and soil deterioration; provides for the orderly use, improvement and development of such lands; and provides for the stabilization of the livestock industry dependent upon the public range; and

WHEREAS, in furtherance of its purposes, said act provides for the creation of grazing districts to include an aggregate area of not more than eighty million acres of vacant, unreserved and unappropriated lands from any part of the public domain of the United States; provides for the exchange of State owned and privately owned lands for unreserved, surveyed public lands of the United States; provides for the sale of isolated or disconnected tracts of the public domain; and provides for the leasing for grazing purposes of isolated or disconnected tracts of vacant, unreserved and unappropriated lands of the public domain; and

WHEREAS, said act provides that the President of the United States may order that unappropriated public lands be placed under national-forest administration if, in his opinion, the land be best adapted thereto; and

WHEREAS, said act provides for the use of public land for the conservation or propagation of wild life; and

WHEREAS, I find and declare that it is necessary to classify all of the vacant, unreserved and unappropriated lands of the public domain within certain States for the purpose of effective administration of the provisions of said act;

NOW, THEREFORE, by virtue of and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 421, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, 37 Stat. 497), and subject to the conditions therein expressed, it is ordered that all of the vacant, unreserved and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, and for conservation and development of natural resources.

The withdrawal hereby effected is subject to existing valid rights.

This order shall continue in full force and effect unless and until revoked by the President or by act of Congress.

10 a.m. E.S.T. Franklin D. Roosevelt

November 26, 1934.

EXECUTIVE ORDER

WITHDRAWAL FOR CLASSIFICATION OF ALL PUBLIC LAND IN CERTAIN STATES

WHEREAS title II of the National Industrial Recovery Act, of June 16, 1933 (ch. 90, 48 Stat. 195), provides among other things for the preparation of a comprehensive program of public works which shall include among other matters the conservation and development of natural resources, including control, utilization, and purification of water, prevention of soil or coastal erosion, and flood control; and

WHEREAS in furtherance of the said act the Special Board for Public Works appointed by Executive Order No. 6174, of June 16, 1933, has by its resolution Of July 18, 1934, included in the comprehensive program of public works contemplated by title II of the National industrial Recovery Act certain projects known as "The Land Program, Federal Emergency Relief Administration"; and

WHEREAS the said Land Program contemplates the use of public lands in the States of Alabama, Arkansas, Florida, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Oklahoma, Washington, and Wisconsin for projects concerning the conservation and development of forests, soil, and other natural resources, the creation of grazing districts, and the establishment of game preserves and bird refuges; and

WHEREAS I find and declare that it is necessary to classify all the unreserved and unappropriated lands of

the public domain within the said States for the purpose of the effective administration of the said Land Program:

NOW, THEREFORE, by virtue of and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 421, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, Stat. 497), and subject to the conditions therein expressed and to valid existing rights, it is ordered that all the public lands in the States of Alabama, Arkansas, Florida, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Oklahoma, Washington, and Wisconsin be, and they are hereby, temporarily withdrawn from settlement, location, sale, or entry, and reserved for classification and pending determination of the most useful purpose to which said lands may be put in furtherance of said Land Program, and for the conservation and development of natural resources.

Public lands within any of the States herein enumerated which are on the date of this order under an existing reservation for a public purpose are exempted from the force and effect of the provisions of this order so long as such existing reservation shall remain in force and effect.

This order shall continue in full force and effect unless and until revoked by the President or by an act of Congress.

Signed: Franklin D. Roosevelt

THE WHITE HOUSE

February 2, 1935.

6964

EXECUTIVE ORDER

ESTABLISHING THE FORT PECK GAME RANGE

MONTANA

By virtue of and pursuant to the authority vested in me as President of the United States and by the act of June 25, 1910, ch. 421, 36 Stat. 847, as amended by the act of August 24, 1912, ch. 369, 37 Stat. 497, and subject to the conditions therein expressed and to all valid existing rights, it is ordered that the following-described lands, insofar as title thereto is in the United States, be, and they are hereby, withdrawn from settlement, location, sale, or entry and reserved and set apart for the conservation and development of natural wildlife resources and for the protection and improvement of public grazing lands and natural forage resources: Provided, That nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of the lands under the applicable laws: Provided further, That any lands within the described area which are otherwise withdrawn or reserved will be affected hereby only insofar as may be consistent with the uses and purposes for which such prior withdrawal or reservation was made: And provided further, That upon the termination of any private right to, or appropriation of, any public lands within the exterior limits of the area included in this order, or upon the revocation of prior withdrawals unless expressly otherwise provided in the order of revo-

cation, the lands involved shall become part of this preserve:

MONTANA PRINCIPAL MERIDIAN

T. 21 N., R. 23 E., secs. 1 to 18, inclusive.
T. 22 N., R. 23 E., all.
T. 21 N., R. 24 E., secs. 1 to 18, inclusive.
T. 22 N., R. 24 E., all.
T. 21 N., R. 25 E., secs. 1 to 18, inclusive.
T. 22 N., R. 25 E., all.
Tps. 21 and 22 N., R. 26 E., all.
T. 21 N., R. 27 E., secs. 1 to 25, inclusive.
T. 22 N., R. 27 E., all.
T. 21 N., R. 28 E., secs. 1 to 23, inclusive, and secs. 26 to 30, inclusive.
T. 22 N., R. 28 E., secs. 5 to 8, inclusive, and secs. 13 to 36, inclusive.
T. 18 N., R. 29 E., secs. 1, 2, 11, 12, and 13.
T. 19 N., R. 29 E., secs. 1, 2, and 3, secs. 10 to 15, inclusive, secs. 22 to 27 inclusive, and secs. 34, 35, and 36.
T. 20 N., R. 29 E., secs. 1, 2, and 3, secs. 10 to 15 inclusive, secs. 22 to 27, inclusive, and secs. 34, 35, and 36.
T. 21 N., R. 29 E., secs. 1 to 18, inclusive, secs. 21 to 28, inclusive, and secs. 33 to 36, inclusive.
T. 22 N., R. 29 E., secs. 31 to 36, inclusive.
T. 18 N., R. 30 E., secs. 4, 5, and 6.
T. 19 N., R. 30 E., secs. 1 to 11, inclusive, secs. 15 to 22, inclusive, and secs. 28 to 33, inclusive.
T. 20 N., R. 30 E., all.
T. 21 N., R. 30 E., secs. 1, 12, and 13, and secs. 19 to 36, inclusive.
T. 22 N., R. 30 E., secs. 1, 12, 13, 24, 25, and 36.
T. 23 N., R. 30 E., secs. 25 and 36.
T. 20 N., R. 31 E., secs. 1 to 8, inclusive, secs. 17 to 20, inclusive, and secs. 29 to 32, inclusive.
Tps. 21 and 22 N., R. 31 E., all.
T. 23 N., R. 31 E., secs. 25 to 36, inclusive.
T. 21 N., R. 32 E., secs. 1 to 12, inclusive, secs. 16 to 19, inclusive, and secs. 30 and 31.
T. 22 N., R. 32 E., all.
T. 21 N., R. 33 E., secs. 1 to 6, inclusive, secs. 9 to 16, inclusive.
T. 22 N., R. 33 E., all.
T. 23 N., R. 33 E., secs. 35 and 36.
T. 21 N., R. 34 E., secs. 6, 7, and 18.
T. 22 N., R. 34 E., all.
T. 23 N., R. 34 E., secs. 22 to 36, inclusive.
T. 22 N., R. 35 E., all.

T. 23 N., R. 35 E., secs. 19 to 36, inclusive.
T. 21 N., R. 36 E., secs. 1, 2, 3, 10, 11, and 12.
T. 22 N., R. 36 E., all.
T. 23 N., R. 36 E., secs. 1, 12, 13, and secs. 19 to 36, inclusive.
T. 21 N., R. 37 E., secs. 1 to 17, inclusive.
Tps. 22 and 23 N., R. 37 E., all.
T. 21 N., R. 38 E., secs. 2 to 11, inclusive, and secs. 14 to 18, inclusive.
T. 22 N., R. 38 E., secs. 1 to 24, inclusive, and secs. 26 to 35, inclusive.
T. 23 N., R. 38 E., all.
T. 24 N., R. 38 E., secs. 25 to 28, inclusive, and secs. 33 to 36, inclusive.
T. 22 N., R. 39 E., secs. 1 to 20, inclusive.
Tps. 23 and 24 N., R. 39 E., all.
T. 25 N., R. 39 E., secs. 1 to 4, inclusive, secs. 9 to 16, inclusive, secs. 21 to 28, inclusive, and secs. 33 to 36, inclusive.
T. 26 N., R. 39 E., secs. 21 to 28, inclusive, and secs. 33 to 36, inclusive.
T. 22 N., R. 40 E., secs. 1 to 9, inclusive, and secs. 16, 17, and 18.
Tps. 23, 24, and 25 N., R. 40 E., all.
T. 26 N., R. 40 E., secs. 19 to 36, inclusive.
T. 23 N., R. 41 E., sec. 6, all.
T. 24 N., R. 41 E., secs. 1 to 16, inclusive, secs. 18, 19, 23, 24, 25, 30, 31 and 36.
T. 25 N., R. 41 E., all.
T. 26 N., R. 41 E., secs. 1, 2, and 3, and secs. 10 to 36, inclusive.
T. 20 N., R. 42 E., sec. 1, secs. 11 to 14, inclusive, and secs. 23 to 26, inclusive.
T. 21 N., R. 42 E., secs. 1 and 2, secs. 11 to 14, inclusive, secs. 23 to 26, inclusive, and secs. 35 and 36.
T. 22 N., R. 42 E., secs. 1 to 4, inclusive, secs. 9 to 16, inclusive, secs. 21 to 28, inclusive, and secs. 34, 35, and 36.
T. 23 N., R. 42 E., secs. 1 to 29, inclusive, and secs. 33 to 36, inclusive.
T. 24 N., R. 42 E., secs. 5 to 11, inclusive, and secs. 14 to 36, inclusive.
T. 25 N., R. 42 E., secs. 4 to 10, inclusive, secs. 15 to 19, inclusive, and secs. 30 and 31.
T. 26 N., R. 42 E., secs. 5 to 8, inclusive, secs. 17 to 20, inclusive, and secs. 29 to 33, inclusive.
T. 20 N., R. 43 E., secs. 5 to 8, inclusive, and secs. 17 and 18.
T. 21 N., R. 43 E., secs. 2 to 11, inclusive, secs. 14 to 23, inclusive, and secs. 26 to 32, inclusive.
T. 22 N., R. 43 E., secs. 4 to 9, inclusive, secs. 16 to 21, inclusive, and secs. 27 to 35, inclusive.

T. 23 N., R. 43 E., secs. 5 to 8, inclusive, secs. 16 to 21, inclusive, and secs. 28 to 33, inclusive.
T. 24 N., R. 43 E., secs. 19 and 20, and secs. 29 to 32, inclusive.

This range or preserve, insofar as it relates to conservation and development of wildlife, shall be under the joint jurisdiction of the Secretaries of the Interior and Agriculture, and they shall have power jointly to make such rules and regulations for its protection, administration, regulation, and improvement, and for the removal and disposition of surplus game animals, as they may deem necessary to accomplish its purposes, and the range or preserve, being within grazing districts duly established pursuant to the provisions of the act of June 28, 1934, ch. 865, 48 Stat. 1269, as amended by the act of June 26, 1936, Public No. 827, 74th Congress, shall be under the exclusive jurisdiction of the Secretary of the Interior, so far as it relates to the public grazing lands and natural forage resources thereof: Provided, however, That the natural forage resources therein shall be first utilized for the purpose of sustaining in a healthy condition a maximum of four hundred thousand (400,000) sharptail grouse, and one thousand five hundred (1,500) antelope, the primary species, and such nonpredatory secondary species in such numbers as may be necessary to maintain a balanced wildlife population, but in no case shall the consumption of forage by the combined population of the wildlife species be allowed to increase the burden of the range dedicated to the primary species: Provided further, That all the forage resources within this range or preserve

shall be available, except as herein otherwise provided with respect to wildlife, for domestic livestock under rules and regulations promulgated by the Secretary of the Interior under the authority of the aforesaid act of June 28, 1934, as amended: And provided further, That land within the exterior limits of the area herein described, acquired and to be acquired by the United States for the use of the Department of Agriculture for conservation of migratory birds and other wildlife, shall be and remain under the exclusive administration of the Secretary of Agriculture and may be utilized for public grazing purposes only to such extent as may be determined by the said Secretary to be compatible with the utilization of said lands for the purposes for which they were acquired as aforesaid under regulations prescribed by him.

The reservation made by this order supersedes as to the above-described lands the temporary withdrawal for classification and other purposes made by Executive Order No. 6910 of November 26, 1934, as amended.

This preserve shall be known as the Fort Peck Game Range.

Franklin D. Roosevelt

THE WHITE HOUSE,

Dec 11 1936

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skills of the Nation's manpower. While employment in many industries not essential to the prosecution of the war will be diminished, it is also true that as the war program accelerates, many Americans not now regularly employed will be called upon to take an active part in production vital to the war effort. Yet it is not on a basis of patriotism alone that employers are urged to open their doors to older workers, but on the basis of sound business sense as well, for it should not be forgotten that these older workers have qualifications that younger persons lack. Work experience, stability, and responsibility are assets we cannot afford to waste in this crisis.

The United States Employment Service with its far-flung network of full-time and part-time public employment offices has always made special efforts in behalf of workers past forty years of age. It is making them today. But it can be successful in placing men and women of middle years only to the extent that all employers cooperate, those in war industries, those in the manufacture or exchange of civilian goods, those in food production. While inviting the attention of private industry to the necessity for training and employing older men and women, I am also hereby calling upon all Federal agencies taking part in the training of workers in various skills to intensify their training activities for older workers in order that we may utilize our full manpower.

NOW, THEREFORE, IN FURTHERANCE OF THIS PURPOSE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, do hereby proclaim the week beginning May 3, 1942, as National Employment Week and Sunday, May 3, 1942, as National Employment Sunday. I urge all churches, civic groups, chambers of commerce, boards of trade, veterans organizations, industry, labor, public-spirited citizens, the press and radio throughout the United States, to observe that week as National Employment Week to the end that our unemployed men and women over forty may be given the opportunity to take their place in and add their efforts to the war production program of the country.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this 13th day of April in the year of our Lord nineteen hundred and forty-two and of the Independence of the United States of America the one hundred and sixty-sixth.

[SEAL]

FRANKLIN D ROOSEVELT

By the President:

SUMNER WELLES,
Acting Secretary of State.

[F. R. Doc. 42-3355; Filed, April 15, 1942; 11:42 a. m.]

[1] 1 F.R. 2482.

EXECUTIVE ORDER 9132

WITHDRAWING PUBLIC LANDS FOR USE OF THE WAR DEPARTMENT IN CONNECTION WITH THE FORT PECK DAM AND RESERVOIR PROJECT

MONTANA

By virtue of the authority vested in me as President of the United States, it is ordered that, subject to valid existing rights, the public lands in the following-described areas be, and they are hereby, withdrawn from all forms of appropriation and use under the public-land laws, including the mining laws, and reserved for the use of the War Department in connection with the construction and operation of the Fort Peck Dam and Reservoir in the Missouri River, State of Montana, authorized by the Act of August 30, 1935, c. 831, 49 Stat. 1028–1034:

PRINCIPAL MERIDIAN, MONTANA

T. 22 N., R. 23 E., sec. 9,
T. 21 N., R. 24 E., sec. 6,
T. 21 N., R. 26 E., sec. 21,
T. 21 N., R. 27 E., secs. 1 and 19,
T. 21 N., R. 28 E., secs. 19 and 20,
T. 20 N., R. 29 E., sec. 26,
T. 20 N., R. 30 E.,
secs. 12 and 13,
sec. 24, N½ and SE¼,
T. 25 N., R. 39 E., sec. 25.

The areas described, including both public and non-public lands, aggregate approximately 7,474.21 acres.

The public lands affected by this order, situated in Montana Grazing Districts Nos. 1, 2, and 6 created by Departmental Orders of July 11, 1935, and October 4, 1939, will remain under the jurisdiction and administration of the Secretary of the Interior for the conservation and development of natural wildlife resources and for the protection and improvement of public grazing lands and natural forage resources, as provided by Executive Order No. 7509 of December 11, 1936,[1] so far as such uses will not interfere with the needs and purposes of the War Department in connection with the project mentioned.

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,
April 13, 1942.

[F. R. Doc. 42-3326; Filed, April 14, 1942; 4:14 p. m.]

Rules, Regulations, Orders

TITLE 14—CIVIL AVIATION

Chapter I—Civil Aeronautics Board

[Regulations, Serial No. 218]

PART 40—AIR CARRIER OPERATING CERTIFICATION

SPECIAL REGULATIONS, CIVIL AIR REGULATIONS, AUTHORIZING CERTAIN PENNSYLVANIA-CENTRAL AIRLINES' PILOTS TO SERVE AS FIRST PILOTS WITHOUT FURTHER QUALIFYING UNDER § 40.2611 (b)

At a session of the Civil Aeronautics Board held at its office in Washington, D. C., on the 11th day of April 1942.

Having had under consideration the request of Pennsylvania-Central Airlines for a waiver of the provisions of § 40.2611 (b) of the Civil Air Regulations,

The Board finds that:

1. Pennsylvania-Central Airlines is in immediate need of additional first pilots to maintain or expand its scheduled air carrier operations and desires to permit second pilots S. S. Smelser, G. H. White and H. A. Corcoran, presently employed by said airline, to serve as first pilots without further complying with the provisions of § 40.2611 (b);

2. As a prerequisite to qualifying such pilots for a particular route under § 40.2611 (b) of the Civil Air Regulations, each first pilot, within six months immediately preceding his qualification for the route, is required to make one one-way trip without passengers over such route;

3. S. S. Smelzer, G. H. White and H. A. Corcoran have been in the employ of Pennsylvania-Central Airlines since May 8, 1940, June 14, 1940, and April 17, 1940, respectively, and are holders of currently effective airline transport pilot certificates. Each of said pilots has made one one-way trip without passengers prior to qualifying for his respective route, on August 11, 1941, between Washington and Norfolk, August 14, 1941, between Washington and Detroit and between Washington, Buffalo and Pittsburgh on September 22, 1941; and

4. Because the immediate need for first pilots did not materialize in September, 1941, these pilots were not promoted, but have since been continuously engaged in regular scheduled operations as second pilots over the above-stated routes. There is now immediate need for qualifying these pilots for the above routes and because the one-way trips already made without passengers were made more than six months immediately preceding qualification for such routes, the air carrier is required to again make such qualifying trips in order to comply with the provisions of § 40.2611 (b). Such strict compliance with § 40.2611 (b) under these circumstances is not required in the interest of safety and because of the present war emergency, which requires the maximum utilization of all available aircraft, it would be inadvisable now to require the above-named three pilots to make one-way trips involving approximately 2,000 miles without passengers;

Now, therefore, the Civil Aeronautics Board, acting pursuant to the authority vested in it by the Civil Aeronautics Act of 1938, as amended, particularly sections 205 (a), 601 and 604 of said Act, makes and promulgates the following special regulation:

Notwithstanding the provision of § 40.2611 (b) of the Civil Air Regulations to the contrary, requiring a first pilot to make one one-way trip without passengers within the six months immediately preceding his qualification for the route, pilots S. S. Smelser, G. H. White and H. A. Corcoran are not required to comply with such provision prior to serving as first pilots over routes, listed in Penn-

Appendix C

History and Philosophy of the Landscape Conservation Movement

In December 1987, the American Planning Association published an article titled *The Great Plains: From Dust to Dust* by Deborah and Frank Popper in its journal, *Planning*. The Poppers describe a Great Plains in decline populated largely by people increasingly unable to produce a living from the land. Private interests, they contended, were rapidly degrading the land and abandoning it.

Their solution was to call for large regions of the plains to be restored to pre-settlement conditions, creating what they termed the "Buffalo Commons." The word "buffalo" was used rather than the more proper term "bison" because it is more familiar to the public and tapped more allusions – buffalo as wildlife, myth, and merchandise. The word "commons" was used to communicate the need for land to be treated as a common property resource, like air or water.

To facilitate rewilding, large amounts of land would be acquired, with distinctions between national parks, grasslands, grazing lands, wildlife refuges, forests, and Indian reservations dissolving over time. In this vision, state and federal management would also blur and blend over time. Bison would fully occupy the commons. It would be the world's largest historic preservation project, a vast land mass in a ten-state national reserve, largely empty, unexploited, and devoid of most human activity.

The project would be a massive federal undertaking requiring land use planning to identify areas for acquisition, determine uses, and devise property buyouts. It would also demand "compassionate treatment" for the displaced Great Plains "refugees." There would need to be coordination between federal agencies, state agencies, and local governments. Congress would have to create a regional agency with a Plains-specific mandate akin to the BLM, but with "much more sweeping powers."

The Poppers' vision was not well received by people who own, live, and work lands in the Great Plains.

Thirty years later, Maxwell Hartt interviewed the Poppers for an article titled *After the Dust Settles* that appeared in the October 2018 edition of *Planning*.[1] He asked if they expected the strong response the 1987 article generated. Frank answered:

> *"We never expected any response at all! This was a total surprise to us. And it just kept going and going! This is the first article that Deborah and I had ever written together. We didn't know that much about what to expect. We thought that nobody would actually care. We did it partly for fun, as sort of a marital exercise, as a kind of strange intellectual hobby. We never expected it to be picked up!"*

While the Buffalo Commons notion may have been born as an intellectual exercise, the Poppers' 1987 article was declared one of the most significant that the American Planning Association had published in *Planning* in the 35 years prior to 2003.

The Poppers began speaking at forums organized around their vision of the region that would host the Buffalo Commons then became focused on practicalities, including a focus on commercial bison and converting from cattle to bison production.

Land trusts, particularly The Nature Conservancy, entered the picture, and began to include bison as part of their fundraising initiatives, habitat restoration programs, and literature outreach. Some were coordinating their work with private bison ranchers through easement land use practices.

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[1] Hartt, M. *After the Dust Settles — Revisiting the Buffalo Commons 30 years later*. American Planning Association. *Planning*. October 2018.

Other land preservation groups found it profitable to promote bison acquisition and restoration programs as part of their missions. Tribes with bison were expanding their herds and increasing numbers of tribes were starting herds. They were generally supportive of the Buffalo Commons vision, with the Rosebud Sioux being the first to endorse the concept as part of the tribe's conservation efforts.

Over time, progressive conservation ideas have shifted from a paradigm of mastery over nature to one of ecosystem-based management. Hierarchical policy was shifting to system-based approaches that rely on a wide range of inputs. Regulatory approaches were starting to make way for grassroots-driven public-private partnerships. Conservation biology became a formal academic field and the identification of the landscape by ecoregion became institutionalized. It is noteworthy that the public-private partnership discussion contains no meaningful discussion of jurisdictional boundaries, state or local responsibilities, or how public private partnerships may blur or impact political and administrative decision making.

In the Spring 2006 issue of the *Journal of Wildlife*, the Poppers authored an article titled *The Onset of the Buffalo Commons*[2] in which they stated that their Buffalo Commons work seemed to be poised to take fantasy to reality. While the nineteenth century had been catastrophic in their minds for bison, the buffalo were starting to come back in the early twenty-first century.

For example, during 2005-2006 the Wildlife Conservation Society hosted a series of meetings to cast a vision for the future of bison. These meetings were reported in a USGS Staff-Published scholarly research paper titled *The Ecological Future of the North American Bison: Conceiving Long-Term, Large Scale Conservation of Wildlife*.[3] The second meeting comprised of indigenous groups, bison producers, conservation organizations, and government and private land managers, was held at the Vermejo Park Ranch in New Mexico. The result was the creation of the Vermejo Statement:

> *"Over the next century, the ecological recovery of the North American Bison will occur when multiple large herds move freely across extensive landscapes within all major habitats of their historic range, interacting in ecologically significant ways with the fullest possible set of other native species, and inspiring, sustaining and connecting human cultures."*

The Vermejo Statement is explicitly: (1) large scale; (2) long term; (3) inclusive; (4) fulfilling of different values; and (5) ambitious. Its authors were professionals employed by state/provincial and federal agencies, tribal governments, universities, nonprofit organizations, and bison ranchers from the United States, Canada, and Mexico. Notably absent were independent livestock associations, local governments, or representatives of grazing organizations dependent on the CVG districts.

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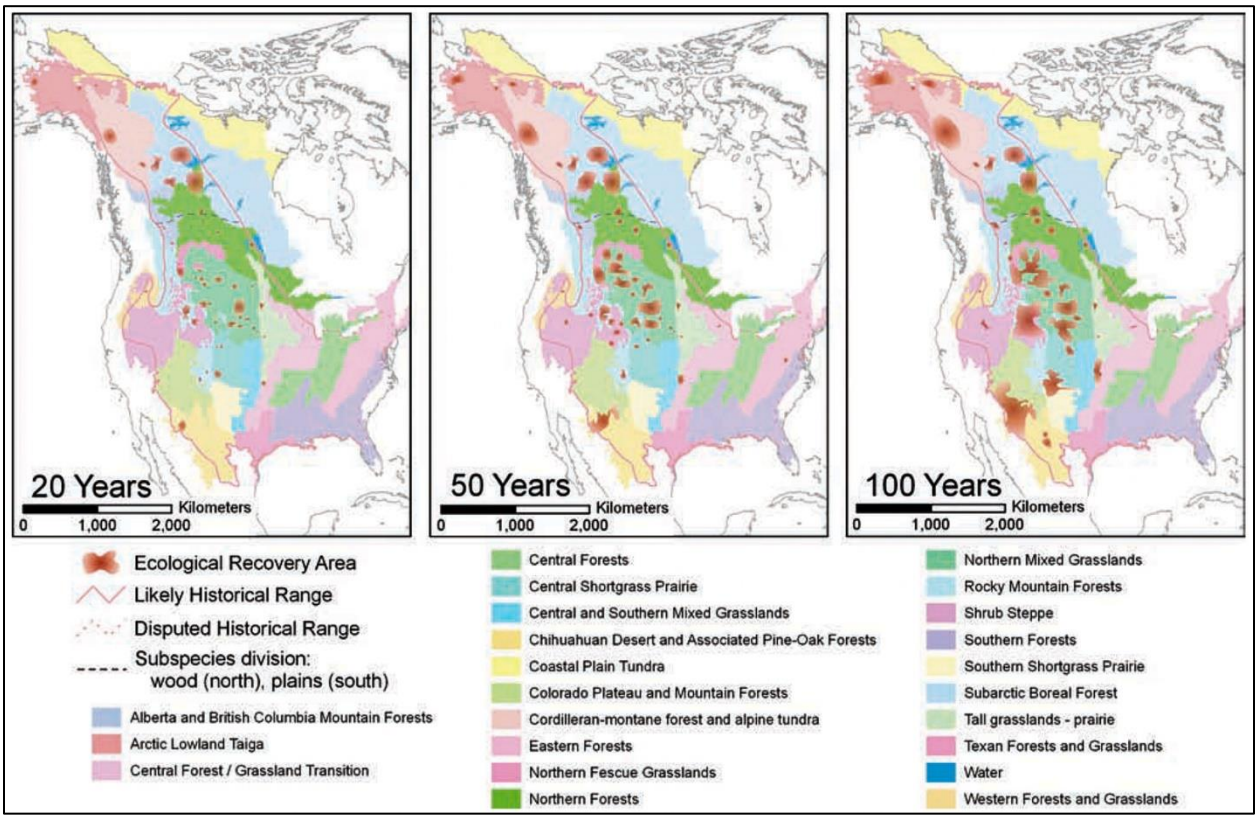
2 Popper, D., Popper, F. (2010). *The Onset of the Buffalo Commons*. Journal of the West. 49. 65-7.

3 Sanderson, Eric W.; Redford, Kent H.; Weber, Bill; Aune, Keith; Baldes, Dick; Berger, Joel; Carter, Dave; Curtin, Charles; Derr, James N.; Dobrott, Steve; Fearn, Eva; Fleener, Craig; Forrest, Steve; Gerlach, Craig; Gates, C. Cormack; Gross, John E.; Gogan, Peter; Grassel, Shaun; Hilty, Jodi A.; Jensen, Marv; Kunkel, Kyran; Lammers, Duane; List, Rurik; Minkowski, Karen; Olson, Tom; Pague, Chris; Robertson, Paul B.; and Stephenson, Bob, "*The Ecological Future of the North American Bison: Conceiving Long-Term, Large-Scale Conservation of Wildlife*" (2008). USGS Staff - Published Research. 608. https://digitalcommons.unl.edu/usgsstaffpub/608.

Fulfillment of the Vermejo Statement vision, as well as that of the Buffalo Commons in general, requires the blurring of state and local geo-political boundaries. It also requires transitioning CVG districts from domestic livestock to wildlife and indigenous animal use. This will lead to conflicts with CVG lands and programs that were purposed by Congress for domestic livestock.

Potential bison recovery zones from 2008-2108



The Northern Plains Conservation Network, recently renamed the Great Plains Conservation Network, is an example of a collaborative effort made up of more than 25 nonprofit and tribal organizations operating in portions of two Canadian provinces and five states, including two-thirds of Montana.[4] Their mission:

> *"The mission of the Great Plains Conservation Network (GPCN) is to restore and maintain the native species, habitats, and natural processes of the Great Plains.*
>
> *Our strategy is to work in partnerships with those who live, work, and recreate in this region to identify and maintain the areas that best contribute to this mission. Through collaboration, we seek to prevent loss or fragmentation of these areas, restore wildlife where possible, and facilitate wildlife movement and other important processes.*
>
> *To succeed, we must identify and link much larger areas than are designated for wildlife and natural habitat today. We must begin to think and act on a different scale – the scale of natural processes (wildlife migrations, fire, hydrology) that transcend municipal and political boundaries."*[5]

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4 https://plainsconservation.org/

5 https://plainsconservation.org/our-vision/

One of the GPCN's member nonprofit organizations, the American Prairie Reserve, is attempting to create the Lower 48 states' largest nature reserve in central Montana. Its goal is to combine APR-owned base properties with commensurate grazing allotments into a 3.2-million-acre preserve. The initiative includes migration corridors and native wildlife species thought to be present prior to human settlement. The APR project proposes deconstruction of improvements, removal of dams, and creation of wildlife corridors. In time, domestic livestock grazing would be discontinued.

The federal government has become increasingly involved in landscape conservation. On September 14, 2009 Department of the Interior Secretary Salazar signed Secretarial Order 3289 directing DOI bureaus to stimulate the development of the Landscape Conservation Cooperative Network as a response to landscape-scale stressors, including climate change. There remain 22 Landscape Conservation Cooperatives (LCCs) designed to address the Department of the Interior policy to utilize landscape-level approaches, when appropriate, to achieve landscape goals at multiple spatial and temporal scales. The objective is to integrate the management of resources across spatial and temporal scales, often across administrative boundaries and political jurisdictions, to enable efficient and effective resource management.[6] The current DOI policy governing the LCCs became effective on January 19, 2017.

Wildlife connectivity between habitat cores is another aspect of landscape conservation and planning. A recent paper in the journal *Conservation Science and Practice* titled *Incorporating wildlife connectivity into forest plan revision under the United States Forest Service's 2012 planning rule*[7] reported on the use of modeling using generic species, defined as virtual species whose profile consists of ecological requirements designed to reflect the needs of real species. The results were used in the development of alternatives for the Custer-Gallatin National Forest (CGNF) in Montana and South Dakota during the ongoing revision of its forest plan. The authors maintain that their results and process could be readily exported for use in forest plan revisions for all the national forests.

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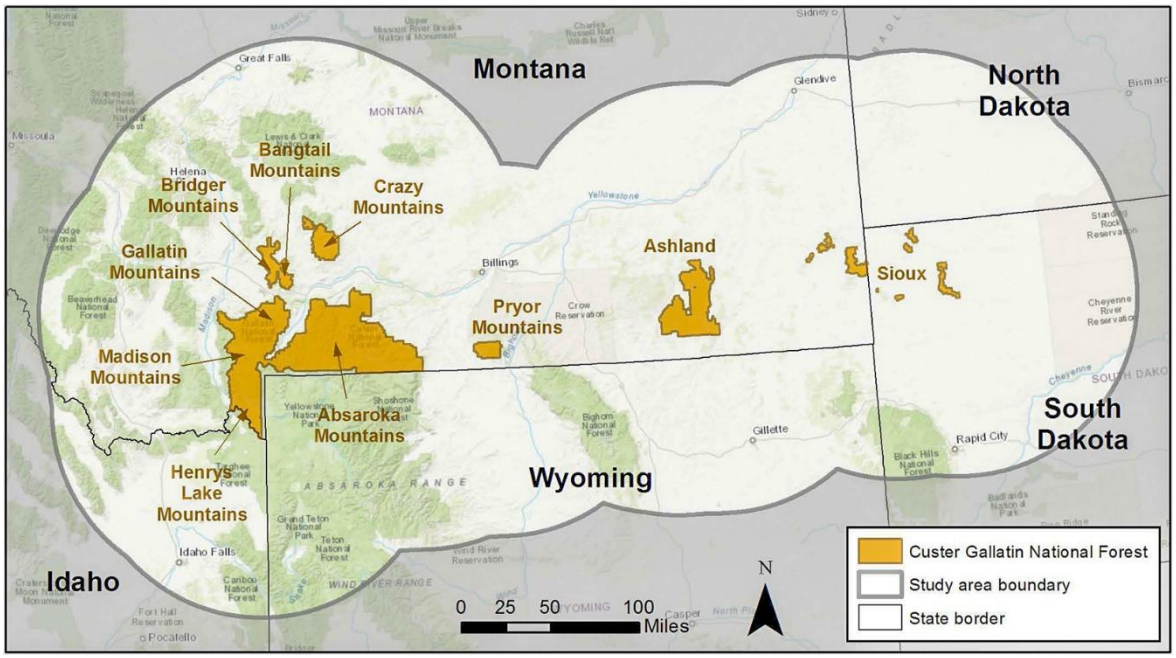
6 Department of the Interior 604 DM 1 § 1.5 policy.

7 Williamson, M., Creech, T., Carnwath, G., Dixon, b., Kelly, V. *Incorporating wildlife connectivity into forest plan revision under the United States Forest Service's 2012 Planning rule*. Society for Conservation Biology. *Conservation Science and Practice.* 2019;e155.

The study carries future implications for federal landscape conservation and wildlife connectivity policy. For instance, in order to assess connectivity throughout the region, the authors buffered each of the CGNF administrative units by 100 miles, resulting in a study area incorporating vast amounts of private lands and state and federal public lands. The study area was then represented using this map:



While the authors did not include recommendations for regulating private property for the purpose of wildlife connectivity, the inclusion of the regional buffer area has the potential to impact county planning departments to further regulate private property for wildlife and landscape conservation. Indeed, they highlighted the "*critical role of focusing conservation efforts on private lands to maintain regional connectivity*."[8]

Throughout the paper, humans and human activities are portrayed as threats to wildlife and wildlife movement across the vast landscape of the study area. The authors stated that their work facilitated the development of potential connectivity-related plan components and provided CGNF staff with regional connectivity information that can be incorporated into the effects analyses conducted for NEPA purposes.

American Prairie Reserve

We do not have to search very far to find a significant example of rewilding taking place in a landscape dominated today by domestic livestock public lands grazing. The American Prairie Foundation (APF) was founded as a Montana non-profit organization in 2001 with the assistance of the World Wildlife Fund (WWS) and the Northern Plains Conservation Network. As organizational capacity increased APF was renamed the American Prairie Reserve (APR) and the NPCN was more recently renamed The Great Plains Conservation Network (GPCN). APR is a rewilding project that incorporates both the Buffalo Commons and landscape-scale conservation philosophies. Within its area of influence, it implements the Vermejo Statement's goals for restoring bison to the Great Plains over the course of this century and beyond. APR is pioneering a private property-based approach that employs purchases from willing sellers of private ranch properties (base properties) that have appurtenant public land livestock grazing

8 Ibid.

allotments on Taylor Grazing Act grazing districts and surrounding lands.

APR's stated goal is to develop and manage a 3.5 million-acre nature preserve that will be the largest nature reserve in the continental United States.[9] In the APR reintroduction plan the organization reported to the WWF in 2005[10], the organization's overall rewilding goal indicated that APR recognized a short-term need to manage their bison as semi-domestic and confined, but that they intend to eventually manage them to become a naturally-regulated free-ranging population of wildlife. Their intent is to establish an ecologically effective population of bison.

APR went on to say that their goal is vastly different than managing bison for production or in the traditional livestock management paradigm. The organization does not believe that domestic livestock operations are often incompatible with biodiversity conservation goals and projects.

Once a property has been purchased and APR is ready, the organization's practice for BLM-managed public lands is to apply for a change in use to replace the existing domestic livestock with bison. Bison do not qualify in statute or rule as domestic livestock[11] and are thus ineligible for normal domestic livestock grazing privileges. They can, however, be granted special grazing permits or leases as privately owned or controlled indigenous animals:

> *"BLM may issue permits to graze privately owned or controlled buffalo under the regulations that provide for (Special Grazing Permits or Leases" fir indigenous animals (section 4130.6-4). So long as the use is consistent with multiple use objectives expressed in land use plans."*[12]

Such permits or leases are locally discretionary and subordinate to those for domestic livestock grazing and are issued at the discretion of the official responsible for issuing grazing permits and leases. They are issued for a term the official deems appropriate, not to exceed ten years.[13] They have no priority for renewal and unlike standard grazing permits and leases, cannot be transferred or assigned.[14] They do not have the same assurance for long-term continuation of grazing privileges to the extent that standard domestic livestock grazing carry. Thus, they do not represent an adequate foundation upon which to build a species restoration project thoroughly dependent upon long-term land use certainty for success.

For USFWS-managed lands on the Charles M. Russell National Wildlife Refuge, domestic livestock grazing is automatically retired by the agency upon APR's purchase of the private base property whose previous owner held grazing permits or leases on the refuge. In this manner, 63,777 acres of public land domestic livestock grazing have already been retired on the CMR (as reported on APR's website).[15]

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9 https://www.americanprairie.org/

10 Kunkel, K., S. Forrest, and C. Freese. 2005. Reintroducing Plains Bison (Bos bison) to American Prairie Foundation lands in Northcentral Montana: 5-year conservation and management plan. Report to the World Wildlife Fund. 62 p.

11 43 CFR § 410010-5 Definitions.

12 Federal Register / Vol. 71, No. 133 / Wednesday, July 12, 2006 / Rules and Regulations, Page 39448.

13 43 CFR § 4130.6-4 Special grazing permits or leases.

14 43 CFR § 4130.6 Other grazing authorizations.

15 https://www.americanprairie.org/building-the-reserve (as of Jan. 27, 2020) "American Prairie Reserve's acquisitions have also resulted in the retirement of 63,777 acres of cattle grazing leases in the neighboring Charles M. Russell National Wildlife Refuge."

Appendix D

DOI Solicitor Memorandum M-37008
BLM's Authority to Retire Grazing Permits
October 4, 2002

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

M-37008

OCT - 4 2002

Memorandum

To: Secretary

From: Solicitor

Subject: Authority for the Bureau of Land Management to Consider Requests for Retiring Grazing Permits and Leases on Public Lands

Question Presented and Summary Conclusion

I have reviewed a memorandum from my predecessor to the Director of Bureau of Land Management (BLM) dated January 19, 2001, regarding BLM's authority to terminate or "retire" grazing on particular public lands at the request of a rancher who holds a permit or lease (hereafter, "permit") to graze livestock on those lands. I conclude that BLM has such authority but only after compliance with statutory requirements and BLM decides the public lands associated with the permit should be used for purposes other than grazing. A decision by BLM to retire livestock grazing is not permanent. It is subject to reconsideration, modification and reversal in subsequent land use plan decisions.

Introduction

This opinion examines the specific situation in which a grazing permittee volunteers to relinquish all or part of a permit to graze livestock upon the condition that BLM will permanently retire grazing on the public lands subject to the permit. This situation arises in the context of resource or land use conflicts and may involve an arrangement between a third party, such as a conservation organization, and a permittee. In such a situation, a third party generally offers to purchase the base property on the condition that the associated grazing permit is permanently retired.[1] This arrangement meets the goals of the two private parties only where BLM, after a public land use planning process, makes an independent decision

[1] This general description is not meant to characterize the only way private parties can reach agreement. A variety of financial arrangements and sale contracts can be used by private parties to acquire private ranches and transfer associated grazing permits. BLM is not a party to these private agreements. While BLM may acknowledge an agreement in the planning process, BLM does its own analysis and makes its own independent decision about devoting public rangelands to a use other than livestock grazing.

regarding the use of the public lands and decides to accept relinquishment of the grazing permit and terminate or "retire" the authorized grazing. However, this "retirement" cannot be considered permanent in nature absent congressional action.[2]

Solicitor Leshy addressed grazing retirement in his January 19, 2001 memorandum. He concluded that BLM could accept relinquished grazing permits through its land use planning process regardless of whether the relinquishment was voluntary or involuntary, although he suggested that voluntary relinquishments should have priority over involuntary relinquishments. He made no distinction between lands within grazing districts and those outside of grazing districts established under the Taylor Grazing Act (TGA). One additional and very important factor concerning grazing relinquishment, whether voluntary or involuntary, must be considered. This factor is that lands within grazing districts have been found to be "chiefly valuable for grazing and the raising of forage crops." There must be a proper finding that lands are no longer chiefly valuable for grazing in order to cease livestock grazing within grazing districts. Moreover, cessation of grazing may implicate congressional reporting requirements and grazing relinquishment decisions are not permanent.

Statutory Framework

Congressional direction regarding livestock grazing on the public lands is found in the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-315o-1; the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1782; and the Public Rangelands Improvement Act of 1978 (PRIA), 43 U.S.C. §§ 1901-1908.

In the TGA, Congress authorized the Secretary to identify lands as "chiefly valuable for grazing and raising forage crops," to place these lands in grazing districts, and to issue permits to qualified applicants. 43 U.S.C. § 315. Lands outside of grazing districts may be leased for livestock grazing. 43 U.S.C. § 315m. The TGA also gives the Secretary the authority to make adjustments to grazing use based on range conditions and to regulate the occupancy and use of the public rangelands in order to preserve the land and its resources from destruction or unnecessary injury and to provide for the orderly use, improvement, and development of the range. 43 U.S.C. § 315a. Under FLPMA, Congress authorized the Secretary to manage public lands on a multiple use and sustained yield basis through land use plans developed with public involvement. 43 U.S.C. § 1712. FLPMA also defines domestic livestock grazing as a "principal or major use." 43 U.S.C. § 1702(*l*). Lastly, in PRIA Congress recognized the need to manage public rangelands to be as productive as feasible for all rangeland values. 43 U.S.C. §§ 1901(b)(2), 1903(b).

[2] To avoid confusion, the voluntary relinquishment of a grazing permit is best referred to as just that -- "relinquishment," not "retirement."

Discussion and Analysis

When considering a proposal to cease livestock grazing on public rangelands, BLM must address a number of important land use planning factors. Some of these factors are set forth in the Leshy memorandum and apply whether the lands are within a grazing district or not. When the lands are within a grazing district, as the vast majority of grazing lands are, BLM must also analyze whether the lands are still "chiefly valuable for grazing and raising other forage crops." 43 U.S.C. § 315. If BLM concludes that the lands still remain chiefly valuable for these purposes, the lands must remain in the grazing district. As such, they would remain subject to applications from other permittees for the forage on the allotment that is relinquished to BLM.

In *Public Lands Council v. Babbitt,* 167 F.3d 1287 (10th Cir. 1999), *aff'd on other grounds*, 529 U.S. 728 (2000), the Tenth Circuit struck down a BLM regulation authorizing conservation use permits. These permits authorized permittees not to graze during the entire term of a ten-year grazing permit. The court found a presumption of grazing use within grazing districts and struck down the regulation because it reversed this presumption:

> The TGA authorizes the Secretary to establish grazing districts comprised of public lands 'which in his opinion are chiefly valuable for grazing and raising forage crops.' 43 U.S.C. § 315. When range conditions are such that reductions in grazing are necessary, temporary non-use is appropriate . . . . The presumption is, however, that if and when range conditions improve and more forage becomes available, permissible grazing levels will rise . . . . The Secretary's new conservation use rule reverses that presumption. Rather than annually evaluating range conditions to determine whether grazing levels should increase or decrease, as is done with temporary non-use, the Secretary's conservation use rule authorizes placement of land in non-use for the entire duration of a permit. This is an impermissible exercise of the Secretary's authority under section three of the TGA because land that he has designated as 'chiefly valuable for grazing livestock' will be completely excluded from grazing even though range conditions could be good enough to support grazing. Congress intended that once the Secretary established a grazing district under the TGA, the primary use of that land should be grazing.

Id. at 1308. The foregoing language clearly applies in the grazing retirement context. If the Secretary cannot foreclose grazing within a grazing district for a ten year period, the Secretary certainly cannot indefinitely retire grazing within a district.

If BLM determines that lands are no longer chiefly valuable for grazing, BLM must express this determination and support it by proper findings in the record of decision that concludes the land use planning process. For lands outside of grazing districts, this analysis is not necessary because BLM has not made a chiefly valuable determination for these lands.

Another factor is that Congress has recognized livestock grazing as one of the principal or major uses of the public lands. The land use planning process should consider whether discontinuing livestock grazing would implicate congressional reporting requirements. *See* 43 U.S.C. § 1712(e)(2).

Finally, land use planning is a dynamic process. In the future, BLM, through the land use planning process, may designate lands where livestock grazing has ceased as once again available for grazing, as circumstances warrant. A decision to foreclose livestock grazing is not permanent. It is subject to reconsideration, modification and reversal in subsequent land use plan decisions. Only Congress may permanently exclude lands from grazing use.

Conclusion

A permittee cannot force BLM to permanently retire a grazing allotment from grazing use. BLM has the authority to consider, through the land use planning process, a permittee's proposal to relinquish a grazing permit in order to end grazing on the permitted lands and to assign them for another multiple use. If the lands are within an established grazing district, BLM must analyze whether the lands are no longer "chiefly valuable for grazing and raising forage crops" and express its rationale in a record of decision. BLM must also consider whether the elimination of livestock grazing as a principal or major use of the public lands triggers congressional reporting requirements. A decision to cease livestock grazing is not permanent. It is subject to reconsideration, modification and reversal in subsequent land use plan decisions. This memorandum supercedes contrary Solicitor's Office memoranda or opinions.

William G. Myers III

Appendix E

DOI Solicitor Memorandum
Clarification of M-37008
CVG Determinations
May 13, 2003

United States Department of the Interior

OFFICE OF THE SOLICITOR

MAY 13 2003

MEMORANDUM

To: Assistant Secretary - Policy, Management and Budget
Assistant Secretary - Land and Minerals Management
Director, Bureau of Land Management

From: Solicitor

Subject: Clarification of M-37008

Background

On October 4, 2002, I issued Solicitor Opinion M-37008 (M-Opinion) concerning the authority for the Bureau of Land Management (BLM) to consider requests for retiring grazing permits and leases on public lands. This memorandum clarifies when BLM must determine if grazing lands are "chiefly valuable for grazing."

This memorandum concludes that chiefly-valuable-for-grazing determinations must be made for administrative purposes whenever the Secretary intends to establish a grazing district, add to a grazing district or modify a district's boundary. Whenever the Secretary considers retiring grazing permits within a grazing district, she must determine whether the permitted lands remain chiefly valuable for grazing if any such retirement may ultimately result in the modification of the district's boundaries. This determination must be adopted in a land use plan or through an amendment to the existing plan. Administrative factors the Secretary should consider in making this determination are: (1) the disruptive effect to any remaining grazing allotments within the district; (2) the decision's effect on the distribution of future grazing revenues within the district; and (3) whether rangeland health can be improved without constructing or maintaining physical range improvements. A chiefly-valuable-for-grazing determination is required only when the Secretary is considering creating or changing grazing districts boundaries. Such a determination is not required nor appropriate when establishing grazing levels within a district.

History of "Chiefly Valuable for Grazing"

The concept of "chiefly valuable for grazing" first appeared in the Stockraising Homestead Act of 1916 (SHA).[1] According to the United States Geological Survey (USGS), the first designation of stock-raising lands (lands chiefly valuable for grazing) under the SHA,

[1]Sec. 2, 39 Stat. 862 (1916).

occurred on November 28, 1917.[2] Prior to this first designation, the Department of the Interior issued instructions to the USGS on how to classify lands under the SHA.[3] Basically, if the land was capable of supporting diversified farming, dry-farming, or was irrigable, the land was not available for disposal as land chiefly for grazing under the SHA.[4] If the land contained merchantable timber, the land was also excluded from designation as chiefly valuable for grazing under the SHA.[5]

The USGS developed a system to classify the public lands by determining the lease value of the land and assessing whether the land was capable of supporting farming. The USGS sorted the lease value of the land into categories of less than one cent per acre, one to two cents per acre, and two to three cents per acre.[6] The one-cent land had a carrying capacity of less than eight animal units to the square mile, the one to two cent land ranged from eight to 15 animal units to the square mile and the remainder able to carry more than 15 or more animal units to the square mile.[7] These designations made up the lands characterized as chiefly valuable for grazing and served as the foundation for the formation of grazing districts.

The Taylor Grazing Act

In 1934, Congress enacted the Taylor Grazing Act[8] (TGA) to prevent overgrazing, to stabilize the livestock industry and to provide for the orderly use of the range.[9] To advance these goals of the TGA, President Roosevelt issued two Executive Orders withdrawing public lands from the operation of the public land laws for the purpose of classifying the land as chiefly

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[2]1918 U.S.G.S. Ann. Rep. 127.

[3]46 I.D. 252 (1917).

[4]Id. at 253.

[5]Id. at 254-55. "The presence of a small amount of timber on the land classified will not exclude it from designation, and a 40-acre tract which contains less than 25,000 feet of saw-timber or its equivalent in poles, posts, or cordwood may, therefore, be designated."

[6]To Provide for the Orderly Use, Improvement, and Development of the Public Range, Hearings on H.R. 6462 Before the Senate Comm. on Public Lands, 73rd Cong., 2d Sess. 49-51 (April 20 to May 2, 1934).

[7]Id.

[8]43 U.S.C. §§ 315-315r (2000).

[9]48 Stat. 1269 (1934) (language derived from uncodified preamble); *see also* 43 U.S.C. § 315a and Executive Order No. 6910 (November 26, 1934), *reprinted in* 54 I.D. 539 (1934). A later order excluded grazing districts from E.O. 6910. Executive Order No. 7274 (January 14, 1936) *reprinted in* 55 I.D. 444 (1936). *See also Andrus v. Utah*, 446 U.S. 500, 516 n. 20 (1980).

valuable for grazing.[10] As envisioned by the TGA, only unreserved public domain lands (exclusive of Alaska) that, in the opinion of the Secretary, "are chiefly valuable for grazing and raising forage crops" may be included within a grazing district.[11] The TGA authorizes the Secretary of the Interior, in his or her discretion, to create grazing districts, to add to the districts and to modify district boundaries.[12] Under this authorization, grazing districts were established and still exist today. Moreover, Congress set apart the chiefly-valuable-for-grazing classification from other classifications by requiring the Secretary to adequately safeguard grazing privileges.[13]

The TGA provides that the Secretary "shall make provision for the protection, administration, regulation and improvement of such grazing districts."[14] Grazing districts, as contemplated by the TGA, provide for the orderly use of the range, effectuate the Secretary's duty to safeguard grazing privileges and determine the formula for the distribution of grazing fees. For example, under the TGA and the Federal Land Policy and Management Act (FLMPA)[15] half of the fees obtained from both grazing permits (issued for grazing within a grazing district) and grazing leases (issued for grazing outside of a grazing district) is deposited in a separate U.S. Treasury account for the purpose of rehabilitation, protection and range improvements on the grazing lands.[16] The other 50% of the fees are treated differently depending upon whether the fees are generated from a grazing district permit or a non-grazing district lease. The 50% of the fees from a grazing district are split with 37.5% sent to the U.S. Treasury as miscellaneous receipts and 12.5% returned to the state or county where the district is located for

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[10]Exec. Order No. 6910 (November 26, 1934) *reprinted in* 54 I.D. 539 (1934). Exec. Order No. 6910 temporarily withdrew all "vacant, unreserved, and unappropriated lands" in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, and Wyoming from settlement, location, sale, or entry for the express purpose of classification and pending determination of the most useful purpose for which the land may be used under the provisions of the TGA. President Roosevelt issued a similar Executive Order, No. 6964, on February 5, 1934, *reprinted in* 55 I.D. 188 (1935), withdrawing "all public lands" in Alabama, Arkansas, Florida, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Oklahoma, Washington, and Wisconsin for determining the most useful purpose under certain projects known as "The Land Program, Federal Emergency Relief Administration," and for conservation and development of natural resources.

[11]43 U.S.C. § 315.

[12]43 U.S.C. § 315.

[13]43 U.S.C. § 315b ("So far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded.").

[14]43 U.S.C. § 315a.

[15]43 U.S.C. §§ 1701-1785 (2000).

[16]43 U.S.C. § 315i (TGA) and 43 U.S.C. § 1751(b)(FLPMA). "Such rehabilitation, protection, and improvements shall include all forms of range land betterment including but not limited to, seeding and reseeding, fence construction, weed control, water development, and fish and wildlife enhancement...." 43 U.S.C. § 1751(b)(FLPMA). *See also* 43 C.F.R. § 4120.3-8 (Range Improvement Fund).

expenditure as the State Legislature may prescribe. [17] The TGA and FLPMA both recognize the importance of improving the range by constructing range improvements that lead to "substantial betterment of forage conditions with resulting benefits to wildlife, watershed protection, and livestock production."[18] A portion of the grazing receipts are used for these purposes. These administrative functions remain a vital component of meeting the objectives of the TGA. Thus, the grazing districts initiated by the TGA retain their importance today as contemplated by Congress when it passed the TGA.

The Federal Land Policy and Management Act and Grazing

When enacting FLPMA, Congress did not repeal or modify the grazing provisions of the TGA.[19] Instead, FLPMA set forth a new structure for the Secretary and the BLM to manage federal lands. Congress also expressly protected the grazing permit system as contemplated by the TGA[20] and expressly preserved the classifications and withdrawals that led to the creation of grazing districts.[21]

FLPMA requires the Secretary to "develop, maintain, and, when appropriate, revise land use plans" for all federal land uses.[22] Land use planning decisions, including allotment management plans (AMPs), control livestock grazing on federal land.[23] These land use plans determine grazing levels and periods of use in order to meet the objectives of multiple use and

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[17] 43 U.S.C. § 315i. For grazing lease receipts, the remaining 50% return to the state and county of the grazing lease.

[18] 43 U.S.C. § 1751(b)(1). *See also* 43 U.S.C. § 315a (improvement of the range); Public Range Improvement Act, 43 U.S.C. § 1901(f) ("the term 'range improvement' means any activity or program on or relating to rangelands which is designed to improve production of forage; change vegetative composition; control patterns of use; provide water; stabilize soil and water conditions; and provide habitat for livestock and wildlife. The term includes but is not limited to, structures, treatment projects, and use of mechanical means to accomplish the desired results.").

[19] 43 U.S.C. § 1701(b) (FLPMA "shall be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.").

[20] § 701(a), Pub. L. 94-579 (1976) ("Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act [Oct. 21, 1976].").

[21] § 701(c), Pub. L. 94-579 (1976) ("All withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act [Oct. 21, 1976] shall remain in full force and effect until modified under the provisions of this Act or other applicable law.").

[22] 43 U.S.C. § 1712(a).

[23] 43 U.S.C. § 1702(k) ("An 'allotment management plan' means a document prepared in consultation with the lessees or permittees involved, which applies to livestock operations on the public lands or on lands within National Forests in the eleven contiguous Western States....").

sustained yield as well as economic and other objectives as determined by the Secretary.[24] The land use planning process, as opposed to the classification process, establishes grazing use. Therefore, determining whether federal land remains chiefly valuable for grazing is neither required nor appropriate during the land use planning process when establishing grazing levels, as in an allotment management plan. An exception to this principle exists when and if the Secretary chooses to create a new grazing district, add to a district or modify a district's boundary as envisioned by the TGA.[25]

The M-Opinion recognizes that the Secretary has the discretion to adjust grazing use based on range conditions, including cancelling a permit, and to regulate the occupancy and use of the range. The BLM determines actual levels and periods of use through the land use planning process. If the BLM develops an AMP for the grazing lands, FLPMA requires the BLM to do so "in careful and considered consultation, cooperation and coordination with the lessees, permittees, and landowners involved."[26] The Secretary has discretion under FLPMA to use the land use planning process to cancel a permit, change grazing use distributions, or to devote the land to another public purpose or disposal, but such a decision must be in accordance with the relevant land use plan.[27]

Grazing "Retirement"

Even though the Secretary has discretion to discontinue grazing, complete and permanent elimination of grazing or a grazing district must be carefully considered and should avoid contravening the purposes for which Congress enacted the TGA. Eliminating grazing or a grazing district may

- disrupt the orderly use of the range,
- breach the Secretary's duty to adequately safeguard grazing privileges,
- be contrary to the protection, administration, regulation and improvement of public lands within grazing districts,
- hamper the government's responsibility to account for grazing receipts, or
- impede range improvements as foreseen by the TGA and FLPMA.[28]

In deciding when the BLM must determine whether federal lands remain chiefly valuable

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[24] 43 U.S.C. § 1702(k)(1).

[25] 43 U.S.C. § 315.

[26] 43 U.S.C. § 1752(d).

[27] 43 U.S.C. § 1752(g). *See also* 43 U.S.C. § 1712(e)(2) (discontinuing a major federal land use may compel Congressional reporting requirements).

[28] 43 U.S.C. § 315i and 43 U.S.C. § 1751(b).

for grazing, we look to the TGA itself. Under section 1 of the TGA, the Secretary must determine whether federal lands are chiefly valuable for grazing when she establishes a grazing district, adds to a district or modifies a district's boundaries.[29] Land restoration achieved by temporary non-grazing may be authorized through land use planning and does not require reconsidering a chiefly-valuable-for-grazing determination.[30] The Secretary may also make a chiefly-valuable-for-grazing determination under section 7 of the TGA. Section 7 of the TGA authorizes the Secretary to classify lands for any uses other than grazing and raising forage crops (as would occur if the Secretary permanently retired public lands from grazing), for disposal in satisfaction of an entry, exchange, or selection or location under any of the remaining non-discretionary land laws (excluding Mining Laws).[31] However, since the passage of FLPMA and its land use planning requirements, section 7 classifications rarely occur in today's federal land management.

Classification of lands as chiefly valuable for grazing is no longer necessary for land use planning because the Secretary has already made the original classification required by TGA. Therefore, there is no need for the BLM continually to re-determine whether the lands remain chiefly valuable for grazing during the land use planning process when establishing grazing levels or when renewing a grazing permit. Thus, a permittee may relinquish a permit but, barring a better use as determined by the Secretary through land use planning, the forage attached to the permit remains available for other permittees until the TGA classification is terminated or the land is removed from the grazing district. As long as the boundary of the grazing district remains in place and the classification and withdrawals remain in effect, there is a presumption that grazing within a grazing district should continue. This was the holding in *PLC v. Babbitt*, 167 F.3d 1287, 1308 (10th Cir. 1999), *aff'd on other grounds*, 529 U.S. 728 (2000) ("Congress intended that once the Secretary established a grazing district under the Taylor Grazing Act (TGA), the primary use of that land should be grazing.").[32] Finally, as stated in the M-Opinion, any decision to retire livestock grazing on federal lands is not permanent, absent some congressional action. Any such action is subject to reconsideration and reversal during subsequent land use planning.[33]

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[29] 43 U.S.C. § 315 ("[T]he Secretary is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or modify the boundaries thereof...").

[30] This memorandum does not address other activities that FLPMA may authorize within grazing districts.

[31] 43 U.S.C. § 315f. In these situations, the BLM looks *prospectively* at the intended land use without examining the existing classification.

[32] *See also* NRDC v. Hodel, 624 F.Supp. 1045, 1054 (D. Nev. 1985). "[The mandate of Congress in PRIA was that livestock use was to continue as an important use of public lands; they should be managed to maximize productivity for livestock and other specified uses."

[33] *See* 43 U.S.C. § 1712(e)(1) ("Such decisions, including but not limited to exclusions (that is, total elimination) of one or more of the principal or major uses made by a management decision shall remain subject to reconsideration, modification, and termination through revision by the Secretary or his delegate, under the provisions of this section, of the land use plan involved.").

Conclusion

The Secretary has already determined that the lands within grazing districts are chiefly valuable for grazing. The Secretary need only make a chiefly-valuable-for-grazing determination when the Secretary is creating a district, adding to a district or modifying a grazing district's boundaries. The Secretary may also make a chiefly-valuable-for-grazing determination under section 7 of the TGA to classify lands for any uses other than grazing and raising forage crops or for disposal. Any decision to retire livestock grazing on federal lands is not permanent, unless made permanent through congressional action. Any such decision is subject to reconsideration and reversal during subsequent land use planning.

Appendix F

DOI Solicitor Memorandum

"*Whether Public Lands Withdrawn by Executive Orders 6910 and 6964 or Established as Grazing Districts are 'Reservations' Within the Meaning of Section 4(e) of the Federal Power Act"*

January 19, 2001

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

M-37005

Memorandum

JAN 19 2001

To: Secretary
Director, Bureau of Land Management

From: Solicitor

Subject: Whether Public Lands Withdrawn by Executive Orders 6910 and 6964 or Established as Grazing Districts are "Reservations" within the Meaning of Section 4(e) of the Federal Power Act

I. Introduction

Section 4(e) of the Federal Power Act (FPA[1]) gives the Secretary of the Interior (Secretary) authority to impose conditions on licenses issued by the Federal Energy Regulatory Commission (FERC[2]) for hydropower projects located on "reservations" under the Secretary's supervision. See 16 U.S.C. §§ 796(2), 797(e); see also Escondido Mut. Water v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984). Specifically, section 4(e) provides:

> That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations.

16 U.S.C. § 797(e).

This conditioning authority was reserved to the Departments of the Interior, Agriculture and War at the time the FPA was enacted to allow, in the words of the U.S. Supreme Court, "the individual Secretaries to continue to play the major role in determining what conditions would be

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[1]Title I of the FPA was originally enacted as the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063. A 1935 amendment changed the name to the Federal Power Act. See Act of Aug. 26, 1935, ch. 687, § 213, 49 Stat. 838, 863 (codified at 16 U.S.C. § 791a). This Opinion generally refers to the 1920 Act and its amendments as the Federal Power Act or the FPA.

[2]In 1977, the Federal Energy Regulatory Commission replaced the Federal Power Commission (FPC), which had been established by the Federal Power Act. See 42 U.S.C. § 7172(a).

included in the license in order to protect the resources under their respective jurisdictions." Escondido, 466 U.S. at 775.[3]

From its enactment in 1920, the FPA's definition of "reservations" has remained essentially unchanged[4]:

> "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks.

16 U.S.C. § 796(2).

The FPA also contains a definition of "public lands," which also has remained essentially unchanged since 1920: "'public lands' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include 'reservations', as hereinafter defined." 16 U.S.C. § 796(1). The FPA's drafters appeared to assume that these terms ("reservations" and "public lands") would together describe all of the lands owned by the United States subject to the Commission's licensing authority.

This Office has previously determined that the Secretary has the authority under section 4(e) of the FPA to issue conditions for hydropower projects located on several categories of Bureau of Land Management (BLM) lands, including the Oregon and California and Coos Bay Wagon Road lands (O&C Act lands), Wilderness Study Areas, and Public Water Reserve (PWR) No. 107 lands. See Memorandum from Associate Solicitor, Energy and Resources, to Director, BLM, on "'Reservations' and the Public Lands under the Federal Power Act" (Aug. 16, 1985) [hereinafter "1985 Opinion"]. The BLM has also considered numerous other categories of lands as "reservations" for purposes of the FPA, including National Petroleum Reserve lands, California Desert Conservation Area lands, Areas of Critical Environmental Concern, Outstanding Natural Areas, Wild and Scenic Rivers designations, Land Utilization Project lands,

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[3]In its original form, the Federal Power Commission was composed of the Secretaries of the Interior, War and Agriculture. See FPA § 1, 41 Stat. 1063 (1920). In 1930, the Commission was changed by removing the Secretaries from membership, and substituting five appointed commissioners. See Act of June 23, 1930, ch. 572, 46 Stat. 797. The fact that the Commissioners were, in the original design, the heads of the Cabinet Departments managing most federal lands helps to provide an understanding of the issue addressed in this Opinion.

[4]The originally enacted version is found at 41 Stat. 1063-64 (1920). The definition was amended in 1935 to reflect the 1921 exclusion of national monuments and national parks from the FPA's general purview and by making plural the 1920 Act's reference to "public purpose" in the second clause. See Act of Aug. 26, 1935, ch. 687, tit. II, § 201, 49 Stat. 838 (1935); see also Act of March 3, 1921, ch. 129, 41 Stat. 1353 (codified at 16 U.S.C. § 797a); H.R. Rep. No. 74-1318, at 22 (1935) ("The only definitions of the present act which are changed are those of 'reservations' and 'corporations'. The definition of the former term has been amended to exclude national parks and national monuments. Under an amendment to the act passed in 1921, the Commission has no authority to issue licenses in national parks or national monuments. The purpose of this change in the definition of 'reservations' is to remove from the act all suggestion of authority for the granting of such licenses.").

Watershed Reserves, and Designated Wilderness Areas. See Letter from Robert F. Burford, Director, BLM, to Hon. Richard H. Lehman, House of Representatives (Mar. 23, 1988) [hereinafter "Burford letter"]. The BLM accordingly has in some cases formulated section 4(e) conditions on licenses for hydropower projects on such lands, just as federal land management agencies like the Forest Service, Fish and Wildlife Service, and Bureau of Indian Affairs have formulated conditions under section 4(e) for the federal lands under their management jurisdiction. See, e.g., Southern Cal. Edison v. FERC, 116 F.3d 507, 518 (D.C. Cir. 1997) (discussing BLM section 4(e) conditions for lands within a watershed reserve).

The question this Opinion addresses is whether "reservations" under the FPA includes lands managed by the BLM which are (a) "withdrawn . . . and reserved" by Executive Order 6910 (Nov. 26, 1934) and Executive Order 6964 (Feb. 5, 1935), or (b) established as grazing districts under the Taylor Grazing Act (TGA). (For simplicity, this Opinion refers to the lands reserved by the Executive Orders and the lands within grazing districts collectively as "TGA lands.")

The Associate Solicitor concluded in 1985 that TGA lands are not "reservations" within the FPA's definition. See 1985 Opinion at 5. This has been the position of the Department ever since (see, e.g., Burford letter, supra), but it has not gone unquestioned. The issue was noted in a House Committee Report in 1988. H.R. Rep. No. 100-950, pt. I, at 3 (1988) (Secretary "does not appear" to have section 4(e) authority over "Taylor Grazing lands"[5]); see also id. at 11 n.2 (minority report noting that "when the FERC was asked to respond to questions about its 4(e) authority, it treated all BLM lands as if they were reserved or withdrawn from the public domain"); Amendments to Federal Land Rights-of-Way Authorities: Hearing on H.R. 3593 Before the Subcomm. on Nat'l Parks and Public Lands of the House Comm. on Interior and Insular Affairs, 100th Cong. 149 (1988) (FERC told the Committee that it had not been resolved whether lands administered by the BLM are "reservations" for the purposes of the FPA and said "[f]or the purposes of answering these questions, BLM lands will be treated as reservations").

In 1989, while addressing the question of whether BLM and the Forest Service had authority to require FERC-licensed hydroelectric projects located on lands under their management to obtain rights-of-way under the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1761, the Comptroller General stated that "[u]nder the FPA's definition of 'reservation,' all of the . . . 'public lands' (other than national monuments and parks), over which BLM has jurisdiction, are reservations." See "The FPA, FLPMA, and the Respective Roles of FERC and the Land Management Agencies," Dec. Comp. Gen. 2, B-230729 (July 7, 1989). The Comptroller General's statement that BLM public lands qualify as FPA reservations did not go unnoticed by the BLM or Congress.

A few weeks later, Chairman Dingell of the House Committee on Energy and Commerce wrote

[5]It appears that the Committee Report's statement regarding "Taylor Grazing lands" was directed solely to lands established as grazing districts, and not to lands that are withdrawn by the Executive Orders of 1934/35. Compare H.R. Rep. No. 100-950, pt. I, at 3 (1988) (reporting that "Taylor Grazing lands . . . account for 34% of the BLM lands") with 1997 Public Land Statistics 9 tbl.5 (reporting that 34% of the public lands under the exclusive jurisdiction of the BLM were within grazing districts).

the Secretaries of the Interior and Agriculture and the Chairman of FERC asking them for their views and comments on the CG's Opinion. Letter from John D. Dingell, Chairman, House Comm. on Energy and Commerce, to Secretary of the Interior Manuel Lujan, Jr., et al. (July 31, 1989). BLM Director Cy Jamison later wrote Congressman Lehman, saying that "[s]ince the Comptroller General's opinion provides only a conclusion on this question, we cannot accept that position at this time. We are asking the Solicitor's Office to re-examine this question and will advise you of the conclusion reached." Letter from Cy Jamison, Director, BLM, to Hon. Richard H. Lehman, House of Representatives (Oct. 30, 1989). The BLM Director had earlier asked the Associate Solicitor for "re-examination of this issue in light of the Comptroller General's Opinion and advise [sic] whether your 1985 Opinion should be modified. We would like to accept the Comptroller General's Opinion." Memorandum from Director, BLM, through Deputy Assistant Secretary, Land and Minerals Management, to Associate Solicitor, Energy and Resources (Sept. 18, 1989).[6]

Attorneys in what was then the Division of Energy and Resources subsequently drafted a memorandum for the Associate Solicitor's signature which concluded that the issue "is not susceptible to a ready response. Arguments may be advanced to support either a positive or a negative response to [the] question, but neither line of reasoning provides a definitive answer." Draft Memorandum from Associate Solicitor, Energy and Resources, to Director, BLM, on "'Reservations' under the Federal Power Act" at 13 (June 1, 1990) [hereinafter "1990 Draft Memorandum"]. The 1990 Draft Memorandum, which was never signed, recommended adherence to the existing administrative practice of not imposing section 4(e) conditions on TGA lands until the courts provided more clarification. Id. The position expressed in the 1985 Opinion has been followed in practice by the BLM and by FERC. See, e.g., Idaho Water Resource Board, 84 FERC ¶ 61,146, at p. 61,792 & n.20 (1998); Henwood Assocs., 50 FERC ¶ 61,183, at p. 61,556 & n.53 (1990); id. at 61,573 (Trabandt, Comm'r, dissenting).

Ongoing and upcoming FERC licensing proceedings for new and previously-licensed hydropower projects has led the BLM to ask me to fully review this question and provide definitive guidance. This opinion is the result. After careful consideration, and for the reasons set out below, I conclude that the TGA lands are "reservations" for purposes of section 4(e) of the FPA. Because the term "reservations" is, as the Supreme Court has noted, "artificially" defined in the FPA to carry out the specific purposes of section 4(e), my conclusion is limited to that context. FPC v. Tuscarora Indian Nation, 362 U.S. 99, 111 (1960). For example, this conclusion does not mean that TGA lands qualify as reservations or reserved lands carrying with them federal reserved water rights. Therefore the conclusion in a previous Solicitor's Opinion, 86 Interior Dec. (I.D.) 553, 592 (1979), that "no reserved water rights were created by the [Taylor

[6]At least one academic commentator has also questioned whether withdrawal of BLM lands for classification purposes might create reservations for purposes of section 4(e). See Teresa Rice, Beyond Reserved Rights: Water Resource Protection for the Public Lands, 28 Idaho L. Rev. 715, 741 (1991-92) ("The status of these lands under section 4(e) is not clear.").

Grazing] Act,"[7] is not affected by this Opinion, which is strictly based on and limited to the meaning of "reservations" for purposes of the FPA.

II. Background: Nineteenth Century Land Laws, the Taylor Grazing Act, and the "Withdrawal" of the Public Lands

The congressional intent behind the FPA's definition of "reservations" is illuminated by the history of the FPA in relation to the contemporary federal public lands policy and laws. From the early days of the Republic throughout nearly all of the nineteenth century, the basic policy regarding public lands was to dispose of them. The laws providing for their disposition were commonly referred to as "the public land laws." They included the so-called entry acts (such as the preemption and homestead statutes) which, when fully complied with, resulted in the divestiture of title to public lands to individuals. They also included laws governing transfers to corporations, such as the railroad land grant acts.

By the end of the nineteenth century, however, public lands policy was evolving toward retention of many public lands in federal ownership, accomplished through the "withdrawal" of lands from the application of the public land laws, and also sometimes the "reservation" of lands for particular purposes. Withdrawals were accomplished both by the Congress and the Executive. See United States v. Midwest Oil, 236 U.S. 459 (1915). By 1901, about 50 million acres of the public domain had been withdrawn as forest reserves. Within a few years, that figure had about tripled.[8] In 1910, Congress delegated broad withdrawal and reservation authority to the Executive under the authority of the Pickett Act, ch. 421, § 1, 36 Stat. 847 (1910) (codified at 43 U.S.C. § 141 (repealed 1976) (also called the General Withdrawal Act).[9]

While the FPA was being debated in Congress, many of the "public land laws" providing for private appropriation and disposal of the public domain were still in effect, and new ones were still being enacted. For example, the Stock-Raising Homestead Act, enacted in 1916, eventually resulted in the disposition of title (other than minerals, which were reserved to the United States)

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[7] Cf. Pamela Baldwin, Congressional Research Service Report for Congress: Legal Issues Related to Livestock Watering in Federal Grazing Districts (Aug. 30, 1994) (hereinafter, CRS Report).

[8] See George Cameron Coggins et al., Federal Public Land and Resources Law 111-12 (4th ed. 2000). National parks were reserved as early as 1872, when Yellowstone was set aside as a "public park or pleasuring-ground," Act of Mar. 1, 1872, ch. 24, § 1, 17 Stat. 32 (1872) (codified at 16 U.S.C. § 21); national forests were reserved beginning in 1891 with the General Revision Act, ch. 561, § 24, 26 Stat. 1095, 1103 (1891) (codified as amended at 16 U.S.C. § 471) (repealed 1976); and federal wildlife refuges were reserved at least as early as 1903, when Pelican Island was set aside, Exec. Order of Mar. 14, 1903.

[9] Other federal laws contained more specific withdrawal and reservation authority. See, e.g., Antiquities Act of 1906, ch. 3060, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431-33).

of some thirty million acres of federal land.[10] The FPA's legislative history reflects congressional awareness of the fact that public lands policy was then in a transitional period between disposal and retention, and the definitions in the Act reflected this awareness.[11]

During this era the distinction between "public lands" on the one hand, and "withdrawn" and "reserved" lands on the other, was generally apparent. As described in the 1934 House Committee Report on the bill that would become the TGA, "[t]hese public lands form a vast domain . . . . Their surface is now and always has been a great grazing common free to all users. The grazing resources of these lands are now being used without supervision or regulation . . . ." H.R. Rep. No. 73-903, at 1 (1934); see also Omaechevarria v. Idaho, 246 U.S. 343 (1918).

However, the distinction between "public lands," and "reserved" and "withdrawn" lands became thoroughly blurred with enactment of the TGA later that year and the events that followed in its wake. Pub. L. No. 73-482, ch. 865, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. §§ 315-315r). As noted by a leading public land historian (and the BLM's first Director):

> One consequence of the establishment of permanent types of federal land units by reservation of public domain was to create some confusion as to the meaning of the latter term. . . . [The term 'public domain'] gradually came to be applied to the land not yet reserved or set aside for continued management. . . . With the passage of the Taylor Grazing Act, even this land is in a sense reserved.

Marion Clawson & Burnell Held, The Federal Lands: Their Use and Management 29 (1957); see also Baldwin, CRS Report, supra note 7 (examining the legislative, judicial, administrative and historical support for categorizing TGA lands as reserved).

Although the story is complex in its details, as discussed in the next few paragraphs, the bottom line for purposes of the legal question before me is simple: TGA lands are "withdrawn, reserved or withheld from private appropriation and disposal under the public land laws" in terms that fit the definition of "reservations" in the FPA. 16 U.S.C. § 796(2).

The TGA authorized the Secretary to "establish grazing districts" on the "vacant, unappropriated, and unreserved lands" of the United States. § 1, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. § 315). It also provided that public notification of a proposal to establish grazing districts "shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement." Id. at 1270. That Act originally limited the creation of grazing districts on public lands to eighty million acres. See id. at 1269.

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[10] See Coggins et al., supra note 8, at 80. At least ten million acres of public domain were entered every year up until 1922; although entries decreased thereafter, they amounted to as much as 5 million acres in 1931. See Marion Clawson, The Federal Lands Revisited 35 (1983).

[11] See, e.g., H.R. Rep. No. 64-66, pt. 2, at 25 (1916) ("Development of Water Power: Views of the Minority") ("Until now the national policy has been to convey the absolute title to the land in whatever way it may be disposed of. But it is now proposed to hold the title to the land in the Federal Government and lease it on long leases. This would be a radical change in Governmental policy.").

Because, as the Supreme Court put it, "the Taylor Grazing Act as originally passed in 1934 applied to less than half of the federal lands in need of more orderly regulation," Andrus v. Utah, 446 U.S. 500, 513 (1980), President Franklin Delano Roosevelt turned to his authority under the Pickett Act of 1910.[12]

FDR issued two sweeping executive orders that effectively withdrew all the public lands from disposal. The first order applied to twelve States in the far West. See infra note 13. In those States, all "vacant, unreserved and unappropriated public land [was] . . . temporarily withdrawn from settlement, location, sale or entry and reserved for classification" for "the purpose of effective administration of the provisions of [the TGA]." Exec. Order No. 6910 (Nov. 26, 1934), reprinted in 54 I.D. 539 (1934). A little more than two months later, FDR acted again. This time he ordered "all the public lands" in twelve other States "temporarily withdrawn . . . and reserved for classification" for "the purpose of the effective administration of the [Land Program authorized by title II of the National Industrial Recovery Act of 1933 (NIRA), ch. 90, § 202, 48 Stat. 195, 201]." Exec. Order No. 6964 (Feb. 5, 1935), reprinted in 55 I.D. 188, 189 (1935).[13] FDR's orders led to this terse conclusion in the General Land Office's 1935 Annual Report: "Because of the withdrawals made by the Executive orders . . . there were no unreserved public lands at the close of business on June 30, 1935." 1935 G.L.O. Ann. Rep. 12.

Acting in the wake of FDR's Executive Orders, Congress amended section 7 of the TGA in June of 1936 to provide for the further classification of the lands "withdrawn . . . and reserved" by these Orders or within grazing districts:

> [T]he Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, . . . and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws . . . . Such lands shall not be subject to

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[12]The Pickett Act of 1910 authorized the Executive to "temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals." § 1, 36 Stat. 847 (repealed 1976). "[S]uch withdrawals or reservations shall remain in force until revoked by [the President] or by an Act of Congress," id., and therefore in law and in practice Pickett Act withdrawals can continue indefinitely. See, e.g., Mecham v. Udall, 369 F.2d 1, 4 (10th Cir. 1966).

[13]Unlike the 1934 Executive Order, which withdrew "all of the vacant, unreserved and unappropriated public land" (emphasis added) in AZ, CA, CO, ID, MT, NV, NM, ND, OR, SD, UT, and WY, the 1935 Executive Order withdrew "all the public lands" in AL, AR, FL, KS, LA, MI, MN, MS, NE, OK, WA, and WI, though it specifically exempted from its effect all "[p]ublic lands . . . which are on the date of this order under an existing reservation for a public purpose . . . so long as such existing reservation remains in force and effect." The slight change in language in the 1935 Order might have been the result of some of the confusion that had resulted from the language of the 1934 Executive Order. See Executive Withdrawal Order of November 26, 1934, as Affecting Taylor Grazing Act and Other Prior Legislation, 55 I.D. 205, 209 (Feb. 8, 1935); Executive Withdrawal Order of November 26, 1934, as Affecting Mineral Permits and Leases and Rights of Way--"Vacant, Unreserved, and Unappropriated Public Land" Construed, 55 I.D. 211 (Feb. 20, 1935).

> disposition, settlement, or occupation until after the same have been classified and opened to entry: *Provided*, That locations and entries under the mining laws . . . may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this Act.

Act of June 26, 1936, ch. 842, § 2, 49 Stat. 1976 (codified as amended at 43 U.S.C. § 315f).

Several decades later, the Supreme Court came to address this mid-1930s activity in Andrus v. Utah, 446 U.S. 500 (1980). It noted that the discretionary classification authority Congress gave the Secretary in the 1936 amendment to section 7 of the TGA "was consistent with the dominant purpose of both the Act and Executive Order No. 6910 to exert firm control over the Nation's land resources through the Department of the Interior." 446 U.S. at 519. The Court characterized the effect of these actions this way: "In sum, the Taylor Grazing Act, coupled with the withdrawals by Executive Order, 'locked up' all of the federal lands in the Western States pending further action by Congress or the President, except as otherwise permitted in the discretion of the Secretary of the Interior for the limited purposes specified in § 7." 446 U.S. at 519; see also 1937 G.L.O. Ann. Rep. 1-2 ("Since the passage of . . . the Taylor Grazing Act, as amended . . . , and the withdrawal of the public lands from entry by Executive orders . . . , the work of the General Land Office has undergone a very decided change. Conservation rather than disposals is the dominant note in the administration of the public lands under existing laws.").

The vast majority of the lands withdrawn by the 1934 Executive Order (No. 6910) were later included within grazing districts.[14] Once so included, they were removed from the application of the 1934 Order. See Exec. Order No. 7274 (Jan. 14, 1936), reprinted in 55 I.D. 444 (1936) (amending Executive Order 6910 "by excluding from the operation thereof all lands which are now, or may hereafter be, included within grazing districts duly established . . . so long as such lands remain a part of any such grazing district"). Of course, these lands remain withdrawn by the terms of the TGA itself "from all forms of entry of settlement" and "shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry." 43 U.S.C. §§ 315, 315f; see also 43 C.F.R. § 2400.0-3 (1999) ("Classification under section 7 [of the TGA] is a prerequisite to the approval of all entries, selections, or locations" on BLM lands, with certain exceptions). Lands covered by the 1934 Executive Order that are not within grazing districts remain subject to the 1934 Order and section 7 of the TGA. The 1935 Executive Order (No. 6964) generally remains applicable to the lands it withdrew and "reserved for classification." Some TGA lands also have been withdrawn or reserved for other purposes.

In a variety of instances, public lands initially "withdrawn . . . and reserved" by the 1934/35 Executive Orders were subsequently opened to entry and disposal through the TGA's classification process. Usually such lands were specifically classified (or reclassified) in order to dispose of them. The net effect is that basically all the public lands that have been classified and

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[14]The most recent available information is that nearly 135 million acres of BLM land are within grazing districts, leaving a little more than 43 million acres of BLM land in the lower 48 States outside of these districts. See 1999 Public Land Statistics 13-14 tbl.1-4 ("Public Lands Under Exclusive Jurisdiction of the Bureau of Land Management, Fiscal Year 1999").

opened to disposal have either been disposed of or have since been reclassified for retention. See, e.g., Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 876 (1990) (by 1970, "'virtually all' of the country's public domain . . . had been withdrawn or classified for retention") (citing Public Land Law Review Comm'n, One Third of the Nation's Land 52 (1970)); 43 C.F.R. § 2400.0-3(a) (1999, adopted in 1970) ("All vacant public lands, except those in Alaska, have been, with certain exceptions, withdrawn from entry, selection, and location under the non-mineral land laws by [the Executive Orders of 1934/35] . . . and by the establishment of grazing districts . . . ."). In FLPMA, enacted in 1976, Congress firmly stamped its imprimatur on this evolution when it declared as "the policy of the United States that (1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest." 43 U.S.C. § 1701(a); see also id. § 1712 (development, maintenance and revision of land use plans).

III. The Plain Language of the FPA

The FPA's definition of "reservations" refers to "lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws." 16 U.S.C. § 796(2) (emphasis added). BLM lands that have been established as grazing districts, as well as BLM lands that continue to be governed by the Executive Orders, all seem to fit squarely within the plain meaning of this definition. That is, because TGA lands are not "subject to disposition, settlement, or occupation until after the same have been classified and opened to entry," 43 U.S.C. § 315f, they would seem properly to be considered "reservations" under the FPA, 16 U.S.C. § 796(2).

IV. The Legislative History of the FPA

The FPA's legislative history supports this plain meaning. The proviso of section 4(e) was derived from House Bill 16673, 63d Cong., 2d Sess. (1914), which provided, in pertinent part, that hydropower projects could be permitted on federal reservations upon a finding by the "chief officer of the department under whose supervision . . . [a] reservation falls that the lease will not injure, destroy, or be inconsistent with the purpose for which such . . . reservation was created or acquired." H.R. Rep. No. 63-842, at 1-2 (1914). This bill did not define the term "reservations," however, which resulted in some discussion on the House floor over the exact scope of that term. The discussion reflected a general agreement that Executive withdrawals under the Pickett Act were properly described by the terms "withdrawn" and "reserved." See, e.g., 51 Cong. Rec. 13701, 13795 (1914) (statements of Rep. Ferris) (referring to Pickett Act withdrawals as "withdrawn" lands and "Executive-order reservations"); id. at 13703 (statement of Rep. Mondell) ("The term 'reserved' is used to designate lands that are withdrawn temporarily under some form of withdrawal, such as the general withdrawal [i.e., the Pickett] act.").

In 1918, the Secretaries of the Interior, Agriculture, and War submitted a bill to Congress that was, with some minor modifications, enacted as the FPA two years later. See H.R. 8716, 65th Cong., 2d Sess. (1918); Escondido Mut. Water v. La Jolla Band of Mission Indians, 466 U.S.

765, 773 n.15 (1984); FPC v. Tuscarora Indian Nation, 362 U.S. 99, 111-12 (1960). The bill adopted the concept for the 4(e) proviso from House Bill 16673, and, following on the earlier discussion on the House floor, specifically defined the term "reservations" to include all lands "withdrawn, reserved, or withheld from private appropriation and disposal under the public-land laws." H.R. 8716, 65th Cong., 2d Sess. (1918). Thus, the legislative history is consistent with the idea that the FPA's definition of "reservations" includes withdrawals under the Pickett Act.

V. Judicial Guidance

The Supreme Court has determined the meaning of "reservations" in the FPA by, not surprisingly, focusing on the statutory definition. See FPC v. Tuscarora Indian Nation, 362 U.S. 99, 111 (1960) (holding that certain lands which were part of the Tuscarora Indian Reservation were not FPA "reservations" because they were owned in fee simple by the Tribe, and thus not "owned by the United States," as required under § 3 of the FPA, 16 U.S.C. § 796(2)). As the Court there noted, "Congress was free and competent artificially to define the term 'reservations' for the purposes it prescribed in that Act[, a]nd we are bound to give effect to its definition of that term." Id.

The Supreme Court has, in sum, regarded the FPA definition as simple and straightforward: "'Public lands' are lands subject to private appropriation and disposal under public land laws. 'Reservations' are not so subject." FPC v. Oregon, 349 U.S. 435, 443-44 (1955).[15] The Court has also concluded that lands withdrawn under the authority of the Pickett Act are reservations within the meaning of the FPA. See id. at 438 n.5, 439 n.6, 443, 444.

Lower courts have also concluded that TGA lands are withdrawn and reserved for purposes of other statutes, although they have not addressed the question in the context of the FPA. For example, in Red Canyon Sheep Co. v. Ickes, 98 F.2d 308 (D.C. Cir. 1938), the plaintiff challenged a proposed exchange involving public lands that had been withdrawn by Executive Order 6910 and later established as a grazing district under the TGA. Applicable law permitted the United States to exchange only "unreserved and unappropriated public lands." Act of June 25, 1935, ch. 308, 49 Stat. 422 (1935). The court declared that "the exchange is not authorized by the Act" because the public lands were, since the issuance of the 1934 Executive Order, "presently reserved and appropriated lands," rather than "unreserved and unappropriated public lands" as required by the exchange statute. 98 F.2d at 322. Other cases demonstrate a similar understanding of the status of TGA lands. See, e.g., Finch v. United States, 387 F.2d 13 (10th Cir. 1967); Carl v. Udall, 309 F.2d 653 (D.C. Cir. 1962).

The Supreme Court's characterization of the purpose of the section 4(e) conditioning authority also sheds some light on its applicability to TGA lands. Specifically, the Court has viewed this

[15]Some lower court opinions involving FPA hydropower licenses do not slavishly follow this terminological construct, and instead use the term "public lands" as meaning generally federal lands, even in cases where reservations like national forests are involved. See, e.g., Montana Power v. FPC, 185 F.2d 491 (D.C. Cir. 1950).

authority as reflecting Congress's desire for "the individual Secretaries to continue to play the major role in determining what conditions would be included in the license in order to protect the resources under their respective jurisdictions." Escondido Mut. Water v. La Jolla Band of Mission Indians, 466 U.S. 765, 775 (1984). These "'special responsibilities,'" id. at 774 (quoting O.C. Merrill Memorandum[16]), are as appropriately found on BLM lands that are reserved from disposal by President Roosevelt's withdrawals or established as grazing districts, and that are currently managed under the organic authority of FLPMA, as they are on other federal lands like national forests.

VI. Administrative Agency Guidance

The FPC long ago endorsed the reasoning which leads to the conclusion that TGA lands are "reservations" within the meaning of the FPA. A 1921 Opinion of the FPC's Chief Counsel (which ends with a notation, "Approved by the Commission") concluded that lands withdrawn under the Reclamation Act of 1902 qualified as FPA reservations. "Classes of Withdrawals Included in Reservations Subject to the Federal Water Power Act" (May 4, 1921), reprinted in 2 FPC Ann. Rep. 220 (1922) [hereinafter "FPC Opinion"]. The question addressed in that Opinion which is pertinent to the issue before me was whether "second form" withdrawals under section 3 of the Reclamation Act are reservations under the FPA.[17] The 1902 Act generally permitted the Secretary to "withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from [reclamation project] works," ch. 1093, § 3, 32 Stat. 388 (1902) (emphasis added). The Chief Counsel noted that while the 1902 Act essentially forbade the Secretary from withdrawing such lands under the homestead laws, it was amended in 1910 to put these lands off limits to homestead entry "until such time as the Secretary of the Interior issues public notice, which notice operates to remove them out of the classification of withdrawn lands and restores them as lands subject to entry, in conformity with the act." FPC Opinion at 221 (citing Act of June 25, 1910, ch. 407, § 5, 36 Stat. 836 (codified as amended at 43 U.S.C. § 436)). Focusing on the general language of the FPA's definition of "reservations," the Chief Counsel reasoned that these second form withdrawals are, until issuance of the public notice, lands "'*withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws*,'" and therefore qualify as FPA reservations. FPC Opinion at 221 (quoting 16 U.S.C. § 796(2)) (emphasis in FPC Opinion). This reasoning applies equally to TGA lands, which, as discussed above, "shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry." 43 U.S.C. § 315f; see also 43 C.F.R. § 2400.0-3 (1999).

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[16]"O.C. Merrill, one of the chief draftsmen of the Act and later the first Commission Secretary, explained that the creation of the Commission 'will not interfere with the special responsibilities which the several Departments have over the National Forests, public lands and navigable rivers.' Memorandum on Water Power Legislation from O.C. Merrill, Chief Engineer, Forest Service, dated October 31, 1917, App. 371." Escondido at 774.

[17]The Opinion also concluded that "first form" withdrawals under the 1902 Reclamation Act and "game preserves, bird preserves, etc." are FPA reservations.

As the FPC Counsel's reasoning shows, the determination of whether federal land has been "reserved" for purposes of the FPA is not affected by the fact that the lands could become available for entry by some future executive action. That is, the Secretary could, simply by issuing a public notice, open land that had been temporarily withheld from homesteading under the provisions of the 1910 Act, but this possibility was not enough to remove the land from the FPA's definition of reservations. Similarly, national forest lands have always been considered reservations even though until 1962, the Secretary of Agriculture retained the authority to classify them as open to entry and disposal under the Forest Homestead Act. See Act of June 11, 1906, ch. 3074, §§ 1-2, 34 Stat. 233 (1906) (codified as amended at 16 U.S.C. §§ 506, 507) (repealed 1962); Act of Mar. 4, 1913, ch. 145, § 1, 37 Stat. 842 (codified as omitted at 16 U.S.C. § 512).[18] The legislative history of the Taylor Grazing Act reflects a similar understanding of the TGA lands. See, e.g., 78 Cong. Rec. 6347 (1934) (statement of Representative Ayers concerning the Taylor Grazing bill) ("the bill takes in all of the land in all of the public-domain States and puts the land into a reserve, the same as the national forest reserve. After these reserves are created in this manner, then on application to the Secretary of the Interior the lands therein may be set aside and homestead entries may be permitted upon them.").

The Department of the Interior has also generally regarded the TGA lands to be "reserved" in a variety of contexts. For example, in 1935, the Solicitor addressed the question whether lands withdrawn by Executive Order 6910 but not included within a grazing district may be leased for grazing purposes pursuant to section 15 of the Taylor Grazing Act, 43 U.S.C. § 315m. Executive Withdrawal Order of November 26, 1934, as Affecting Taylor Grazing Act and Other Prior Legislation, 55 I.D. 205, 209 (Feb. 8, 1935). The Solicitor answered in the negative because section 15 authorizes the Secretary to lease only "'vacant, unappropriated, and *unreserved* lands.'" Id. (emphasis in the 1935 Opinion). "Having been reserved by the said Executive Order," the Solicitor concluded, "they may not be leased for that purpose so long as the order remains in force." Id.[19] See also Carl v. Udall, 309 F.2d 653, 658 (D.C. Cir. 1962) (speaking of the "reservation" of land under the 1934/35 Executive Orders) (quoting Nelson A. Gerttula, A-23158 (Dec. 31, 1941)); J.A. Allison and Mark L. Johnson, 58 I.D. 227, 234 (1943) (same); Executive Withdrawal Order of November 26, 1934, as Affecting Mineral Permits and Leases and Rights of Way–"Vacant, Unreserved, and Unappropriated Public Land" Construed, 55 I.D. 211 (Feb. 20, 1935) (same). And see discussion infra note 21.

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[18]The fact that TGA lands may be disposed of by sale or exchange, for example, also does not exclude them from FPA reservation status. See, e.g., 43 U.S.C. § 1716(a) (providing that BLM and National Forest System lands may be "disposed of by exchange" where "the Secretary concerned determines that the public interest will be well served by making that exchange"); 36 C.F.R. Pt. 254 (2000) (regulations for the sale and exchange of National Forest System lands); Exec. Order Nos. 7048 (May 20, 1935), 7235 (Nov. 26, 1935), and 7363 (May 6, 1936), reprinted in 55 I.D. 261, 401, 502 (1935-36) (amending Executive Orders 6910 and 6964 to permit sales, exchanges and leases).

[19]Several months later, a new executive order authorized the Secretary to issue leases under section 15 of the TGA on lands withdrawn by Executive Order 6910 whenever the Secretary determined that such lands may be "properly subject to such . . . lease and [are] not needed for any public purpose." Exec. Order No. 7235 (Nov. 26, 1935), reprinted in 55 I.D. 401 (1935).

Many of the TGA lands do remain subject to private appropriation pursuant to the Mining Law of 1872, see 30 U.S.C. § 22, but this does not operate to exclude them from FPA "reservation" status. The FPA has long been applied to include within its definition of reservations lands which are open to appropriation under the Mining Law, but which are otherwise withdrawn or reserved. For example, the national forests also generally remain open to mineral entry, yet they are specifically cited in the FPA's definition of "reservations" as satisfying the definition. See 16 U.S.C. § 478. See also Southern Cal. Edison v. FERC, 116 F.3d 507, 518 (D.C. Cir. 1997), where the court upheld BLM conditions imposed under the FPA's section 4(e) on lands that were "withdrawn from settlement, location, filing, entry or disposal under the land laws of the United States" to protect Los Angeles' water diversions, but which were by the same statute "at all times [to] be open to exploration, discovery, occupation, and purchase permit or lease under the mining or mineral leasing laws of the United States." Act of Mar. 4, 1931, ch. 517, §§ 1-2, 46 Stat. 1530, 1547-48 (1931). As the Supreme Court pointed out in Udall v. Tallman, 380 U.S. 1, 19-20 (1965):

> [T]he term 'public land laws' is ordinarily used to refer to statutes governing the alienation of public land, and generally is distinguished from both 'mining laws,' referring to statutes governing the mining of hard minerals on public lands, and 'mineral leasing laws,' a term used to designate that group of statutes governing the leasing of public lands for gas and oil. Compare Title 43 U.S.C., Public Lands, with Title 30 U.S.C., Mineral Lands and Mining.

This conclusion is consistent with the legislative intent of the FPA because the Secretary retains the kind of "special responsibilities" for TGA lands that the Supreme Court has recognized as underlying the section 4(e) authority. See Escondido Mut. Water v. La Jolla Band of Mission Indians, 466 U.S. 765, 774 (1984); see, e.g., 43 U.S.C. § 1732 (directing the Secretary's management of BLM lands, including those subject to appropriation under the Mining Law).

VII. The 1985 Associate Solicitor's Opinion

The Associate Solicitor for Energy and Resources concluded that TGA lands were not "reservations" for purposes of the FPA because they "lack the necessary element of being dedicated for some public purpose." 1985 Opinion at 5. In one paragraph of analysis, the Associate Solicitor read the FPA's definition of reservations as "contemplat[ing] that a particular purpose for the lands has already been determined." Id. Because FDR's Executive Orders "only withdrew, but did not dedicate the lands for some particular usage, Taylor Grazing lands do not fall within the FPA's definition of 'reservations.'" Id.

This reasoning is not persuasive. First, the statutory definition refers to withdrawals or reservations (i.e. lands "withdrawn, reserved, or withheld from private appropriation and disposal

under the public land laws"). 16 U.S.C. § 796(2); see also FPC Opinion, supra.[20] Second, TGA lands were set aside for identifiable public purposes as required by the Pickett Act (authorizing the President to "withdraw . . . and reserve" public lands for "public purposes to be specified in the orders of withdrawals," ch. 421, § 1, 36 Stat. 847 (repealed 1976)). The 1934 withdrawal was "for the purpose of effective administration of the provisions of the [TGA]," which, the Order stated, "provides, among other things, for the prevention of injury to the public grazing lands by overgrazing and soil deterioration; provides for the orderly use, improvement and development of such lands; and provides for the stabilization of the livestock industry dependent upon the public range; and . . . provides for the use of public land for the conservation or propagation of wild life." Exec. Order No. 6910 (Nov. 26, 1934), reprinted in 54 I.D. 539 (1934).[21] The 1935 withdrawal was "for the purpose of the effective administration of the [Land Program authorized by NIRA, § 202, 48 Stat. 201]," which the Order stated "contemplates the use of public lands . . . for projects concerning the conservation and development of forests, soil, and other natural resources, the creation of grazing districts, and the establishment of game preserves and bird refuges." Exec. Order No. 6964 (Feb. 5, 1935), reprinted in 55 I.D. 188-89 (1935). This Order also recognized that NIRA provides that the Land Program "shall include among other matters, the conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, and flood control." Id. at 188; see also NIRA § 202, 48 Stat. 201 (1933).[22]

Other withdrawals of public lands under the authority of the Pickett Act have long been recognized as being "reservations" within the meaning of the FPA, and no important differences

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[20]The Associate Solicitor's reference to lands being "dedicated for some public purpose" may have been influenced by a separate clause in the definition of reservations that refers to lands "held for any public purposes." However, this clause is separated from the rest of the definition with a semicolon and the word "also," and refers to acquired lands (i.e. "also lands and interests in lands acquired and held for any public purposes"). 16 U.S.C. § 796(2).

[21]In 1935, the Solicitor addressed the question of "whether a grazing district can be established and superimposed on land withdrawn under [Executive Order 6910]." Executive Withdrawal Order of November 26, 1934, as Affecting Taylor Grazing Act and Other Prior Legislation, 55 I.D. 205, 209 (Feb. 8, 1935). Section 1 of the TGA generally authorizes the Secretary to "establish grazing districts . . . of vacant, unappropriated, and unreserved lands" and it prohibits the establishment of grazing districts on "lands withdrawn or reserved for any other purpose . . . except with the approval of the head of the department having jurisdiction thereof." 48 Stat. 1269 (codified as amended at 43 U.S.C. § 315). The Solicitor relied on this exception in concluding that grazing districts could be established on lands affected by Executive Order 6910 so long as the necessary approval was obtained. See 55 I.D. at 209. The Solicitor's reasoning reflected an understanding that such lands were "withdrawn or reserved for a[] . . . purpose" (and that they were not "vacant, unappropriated, and unreserved lands"), 43 U.S.C. § 315.

[22]The TGA states that the purposes of grazing districts are "to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range." 43 U.S.C. § 315a; see also Pub. Lands Council v. Babbitt, 120 S.Ct. 1815, 1819 (2000) ("The Taylor Act seeks to 'promote the highest use of the public lands.' 43 U.S.C. § 315. Its specific goals are to 'stop injury' to the lands from 'overgrazing and soil deterioration,' to 'provided for their use, improvement and development,' and 'to stabilize the livestock industry dependent on the public range.' 48 Stat. 1269.").

exist between them and TGA lands for purposes of this analysis. The 1985 Associate Solicitor's Opinion itself recognized one important category of Pickett Act withdrawals as being FPA "reservations." That is, President Coolidge invoked his authority under the Pickett Act,[23] to withdraw for public use vacant, unappropriated and unreserved public lands surrounding springs or water holes on public lands. See Exec. Order of April 17, 1926 ("Public Water Reserve No. 107"), reprinted in 51 L.D. 457 (1926). The Associate Solicitor distinguished these from the TGA lands on the ground that PWR 107 lands were "reserved" as well as "withdrawn." 1985 Opinion at 5-6. Yet like the Executive Order for PWR No. 107 lands, the TGA Executive Orders not only withdrew lands "from settlement, location, sale or entry," but also reserved the lands for public purposes under the authority of the Pickett Act. Compare Exec. Orders No. 6910 (Nov. 26, 1934) and 6964 (Feb. 5, 1935) with Exec. Order of April 17, 1926 ("Public Water Reserve No. 107"). Thus, the 1985 Opinion's differential treatment of these withdrawals is unconvincing.

The 1985 Opinion also suggested that the FPA's definition of "reservations" may have contemplated only "a 'permanent' reservation" as opposed to "temporary withdrawals" because the statutory definition names military reservations and national forests.[24] I am not persuaded that any significance can be drawn from the examples used in the definition in this regard. Early legislative history indicates that Congress intended the definition of "reservations" to include all withdrawals and reservations, whether temporary or permanent. See discussion supra Part IV. The House version of the bill that became the FPA contained only the substance of the definition that appeared in the 1920 Act, without including any references to specific categories such as national forests or military reservations. See, e.g., H.R. Rep. No. 65-715 (1918). These references were added later by the Senate. See S. Rep. No. 66-180 (1919). The Supreme Court has said that "[i]t seems entirely clear that no change in substance was intended or effected by the Senate's amendment, and that its 'recasting' only specified, as illustrative, some of the 'reservations' on 'lands and interests in lands owned by the United States.'" FPC v. Tuscarora Indian Nation, 362 U.S. 99, 112 (1960). The 1985 Opinion did not discuss this Supreme Court opinion.

Finally, as noted earlier, many other "temporary" withdrawals have long been considered "reservations" for FPA purposes. See, e.g., FPC v. Oregon, 349 U.S. 435, 438 n.5, 439 n.6, 443, 444 (1955). PWR No. 107 lands were, like the TGA Executive Orders, withdrawn and reserved under the authority of the Pickett Act. The 1921 FPC Counsel's Opinion acknowledged that second form withdrawn lands were only "withh[e]ld . . . from entry . . . until public announcement of the date when water could be applied." FPC Opinion at 221. And the 1985 Opinion itself said that "wilderness study areas" on public lands "must be considered as 'reservations' under the FPA" even though it recognized that the areas might become open to appropriation once wilderness studies were complete on the lands and Congress had acted on them. 1985 Opinion at 7.

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[23] See also Stock-Raising Homestead Act of 1916, ch. 9, § 10, 39 Stat. 865 (codified as amended at 43 U.S.C. § 300) (repealed 1976).

[24] This suggestion was in a footnote in its introductory background section (1985 Opinion at 3 n.3), and not in its discussion of the Taylor Grazing Act.

VIII. The Relationship Between Section 4(e)'s Conditioning Authority and BLM's Right-of-Way Authority

The Comptroller General's 1989 Opinion, which was referred to in the introduction to this Opinion (see discussion supra p. 3), stated that all BLM-managed "'public lands' . . . are reservations" within the meaning of the FPA. The CG was, however, addressing a somewhat different question; namely, whether BLM and the Forest Service had authority to require FERC-licensed hydroelectric projects located on lands under their management to obtain rights-of-way under FLPMA (43 U.S.C. § 1761). The CG answered this question in the affirmative, and this conclusion was accepted by FERC, Henwood Assocs., 50 FERC ¶ 61,183 (1990), but then overturned by the Ninth Circuit, California v. FERC, 966 F.2d 1541 (9th Cir. 1992).

Congress quickly responded to the 9th Circuit's decision in the Energy Policy Act of 1992, Pub. L. No. 102-486, tit. XXIV, § 2401, 106 Stat. 3096-97 (codified at 43 U.S.C. § 1761). There Congress "reiterate[d] and clarif[ied]," albeit prospectively, the authority and responsibility of the BLM to require and condition rights-of-way for FERC-licensed hydropower projects that would occupy any BLM lands. H.R. Rep. No. 102-474, pt. VIII, at 98, reprinted in 1992 U.S.C.C.A.N. 2316. The House Committee Report described the purpose of the provision as to "assure" that federally-licensed hydropower projects requiring such rights-of-way "would not substantially degrade the natural and cultural resources of the affected lands, or interfere with their mangement [sic] for other purposes under applicable law." Id. at 153, reprinted at 2371.

While this statute reflects a congressional concern that BLM (along with the Forest Service) has authority to protect the resources under its management from adverse effects from federally licensed hydropower projects, this authority over rights-of-way does not duplicate BLM's authority under section 4(e) of the FPA. Most important, it essentially extends only to new projects proposed after 1992, or to existing projects that seek to expand onto additional BLM lands after 1992. See 43 U.S.C. § 1761(d). Thus, section 4(e) conditioning remains the primary means for the Secretary to insure the protection of the resources under BLM's management from the impacts of pre-1992 FPA hydropower development.

IX. Practical Effects of this Opinion

At first blush, the conclusion that the TGA lands, which comprise well over one hundred million acres of public land, ought now to be considered "reservations" under the FPA would seem to work a major change in the relicensing process. For a number of reasons, however, the practical effect of this Opinion is limited.

First, most TGA lands are in arid areas and contain few hydropower projects as a result. Second, as noted earlier, a considerable amount of BLM land is already considered a "reservation" under the FPA (e.g., O&C Act lands, Wilderness Study Areas). Third, many BLM lands are adjacent to other federal lands that have always been considered reservations under the FPA. Accordingly, BLM's conditioning authority on its lands is likely to be exercised in a manner similar to that exercised by the neighboring federal agencies, principally the U.S. Forest Service.

Finally, I have determined to make this Opinion prospective only; that is, it authorizes BLM to submit section 4(e) conditions to FERC in all future licensing proceedings,[25] and in all pending proceedings where such conditions reasonably can be formulated and submitted for incorporation into a license by FERC. I have determined not to limit the application of this Opinion simply to applications filed in the future because FERC licensing proceedings may continue for many years, and often there is considerable time at the beginning of the process when information is being gathered. Agency section 4(e) conditions generally are not even solicited by FERC until months, and in some cases years, after the license application is filed. See, e.g., 84 FERC ¶ 61,107, at pp. 61,536-38 (1998) (describing the extreme example of the Cushman Project licensing proceedings, in which conditions and recommendations were not solicited by FERC until 20 years after the proceedings were initiated). We will, however, not seek to reopen existing licenses to add section 4(e) conditions based on this Opinion.

X. Conclusion

The plain language of the FPA, its legislative history, pertinent case law, and administrative rulings all compel the conclusion that BLM-managed lands that are "withdrawn . . . and reserved for classification" by Executive Orders 6910 and 6964 and those that are established as grazing districts, are "reservations" under the FPA. Therefore, I conclude that the Secretary has authority to issue mandatory conditions on licenses issued by FERC for hydropower projects located on such lands under his jurisdiction, and the 1985 Associate Solicitor's conclusion to the contrary is hereby overruled. Accordingly, when the BLM deems that section 4(e) conditions are "necessary for the adequate protection and utilization of" Taylor Grazing Act lands, 16 U.S.C. § 797(e), it should submit them to FERC in all pending licensing proceedings where they reasonably can be formulated and submitted for incorporation into licenses by FERC, and in all future licensing proceedings.

This Opinion was prepared with the substantial assistance of Scott Miller of the Division of Indian Affairs and S. Elizabeth Birnbaum, formerly Special Assistant to the Solicitor and now Associate Solicitor for Mineral Resources, and benefitted from a careful review by Richard J. Woodcock of the Division of Land and Water.

John D. Leshy
Solicitor

I concur:

Secretary

January 19, 2001
Date

[25]The references to licensing proceedings include proceedings for new licenses for previously licensed projects, as well as for new projects (which FERC calls "original licenses").

Appendix G

Federal Register Volume 71, No. 133

Grazing Administration 40 CFR Part 4100
Pages 39447, 39448

July 12, 2006

BLM has suspended, are not at risk of loss for failure to use.

One comment urged BLM to address the concept of grazing associations, explain what they are, and examine if all members of an association must own base property.

A grazing association is a group of ranchers organized into an association for the common benefit and welfare of the members. Grazing associations are organized under the laws of the state where they are located. Under section 4110.1(a)(2), a grazing association may apply and qualify for grazing use on public lands if all members of the association own or control land or water base property.

One comment stated that BLM should not allow large corporations to acquire grazing permits but instead reserve permits for local families who have a tradition of farming and ranching in the area.

It is not within BLM's authority to adopt this suggestion. The TGA authorizes the Secretary to issue grazing permits to ''corporations authorized to conduct business under the laws of the State in which the grazing district is located.'' The TGA does not place limits on which corporations may be issued permits based on their size.

One comment asked BLM to clarify whether state government agencies are qualified to hold public land grazing permits.

Section 4110.1 on mandatory qualifications states that to qualify for grazing use on public lands, one must own land or water base property and must be a citizen or have filed a declaration of intention to become a citizen or petition for naturalization, or be a group or association authorized to conduct business in the state where the grazing use is sought, all members of which are citizens or have filed petitions for citizenship or naturalization, or be a corporation authorized to conduct business in the state in which the grazing use is sought. Although state agencies may acquire base property, they are not a citizen, group, association, or corporation authorized to conduct business in the state in which the grazing use is sought. Therefore, state agencies are not qualified under the grazing regulations for grazing use on public lands. Thus, unless the exception for base property acquisition by an ''unqualified transferee'' in the circumstances described at section 4110.2–2(e) applies (which provides for issuing a permit or lease to an unqualified transferee for up to two years when they acquire base property by ''operation of law or testamentary disposition''), state agencies may not be granted a grazing permit or lease.

BLM recognizes that at times a state agency, typically the state wildlife agency, will acquire base property for various purposes, may apply for the associated grazing preference on public lands, and may express their wishes that the grazing preference be reallocated to wildlife, or express an interest to limit use of the grazing preference and permit to grazing treatments that are, for example, necessary for maintenance or improvement of habitat for wildlife. BLM will cooperate with state agencies wherever possible to pursue common goals. However, BLM land use plans set forth management goals and objectives and the ways and means available for achieving those objectives. Where state agencies have acquired base property and do not wish to use the public land grazing preference associated with that property in conformance to the governing land use plan, BLM may work with the state agency, affected permittees or lessees, and any interested public to consider options regarding the management of affected public lands. This could include reallocating the forage to another permittee or lessee. It is not within BLM's authority to issue term grazing permits to state agencies, even if they own livestock, because they do not meet mandatory requirements to qualify for grazing use on public lands. This, however, does not preclude other arrangements such as where the state agency may form a separate corporation chartered by the state for purposes of holding and managing a public lands grazing permit.

One comment suggested that we amend section 4130.1–1 to require that BLM offer permittees and lessees a new permit or lease 150 days in advance of their permit or lease expiration date, and suggested that we amend section 4110.1(b) to refer to this proposed requirement.

We have not adopted this comment in the final rule. Permit renewal time frames are best addressed in BLM's policy guidance and the BLM Manual rather than in regulations. Also, section 4110.1 deals only with qualifications of applicants, and the only necessary cross-reference is to provisions in section 4130.1–1 on determining satisfactory performance, which is a mandatory qualification. Other procedural matters are not relevant to section 4110.1.

Finally, one comment urged BLM to prohibit the transfer of preference to groups seeking to eliminate grazing.

BLM has not changed its regulations in response to this comment. In order to qualify for grazing use on public lands, one must still meet the requirements of section 4110.1. Other regulatory provisions allow BLM to cancel preference should a permittee or lessee fail to make grazing use as authorized.

Section 4110.2–1 Base Property

In this section, we proposed an editorial change, dividing paragraph (c) of the existing regulations into two parts, designated (c) and (d), since the paragraph addressed two subjects: the requirement to provide a legal description of the base property, and the sufficiency of water as base property. No public comments addressed this section, and we have made no changes in the final rule.

Section 4110.2–2 Specifying Grazing Preference

We amended this section in the proposed rule to replace the term ''permitted use'' with the term ''grazing preference'' or ''preference.'' We discuss comments on the change in terminology under the definitions section. No comments addressed this section as such, and we have made no changes in the final rule.

One comment on this section urged BLM to give preference to buffalo ranchers in issuing grazing permits because use by buffalo pre-dates use by cattle on the range, and they therefore have right by history to receive first consideration for grazing use. Another comment stated that BLM should let ranchers decide how many livestock should be grazed and adjusted based on their judgment because most ranchers are good stewards of the land. Another comment urged BLM not to make changes in preference solely on the basis of forage allocations in land use plans, stating that monitoring must be used to justify changes in authorized levels of grazing use.

We have not changed the final rule in response to these comments. BLM has no authority to give priority to buffalo ranchers when issuing grazing permits or leases. The TGA requires that when issuing grazing permits, the Secretary must give preference to landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water, or water rights owned, occupied, or leased by them. (Grazing permits authorize grazing use on lands within grazing districts established under Section 1 of the Act.) The Act also requires that when issuing grazing leases, the Secretary must give preference to owners, homesteaders, lessees, or other lawful occupants of lands contiguous to the public lands

available for lease, to the extent necessary to permit proper use of such contiguous lands, with certain exceptions. (Grazing leases authorize grazing on public lands outside grazing districts.) Therefore, under the TGA, the kind of animal an applicant for a permit or lease wishes to graze on public lands has no bearing on whether the applicant has or will be granted preference for a grazing permit or lease. BLM may issue permits to graze privately owned or controlled buffalo under the regulations that provide for ''Special Grazing Permits or Leases'' for indigenous animals (section 4130.6–4), so long as the use is consistent with multiple use objectives expressed in land use plans.

Both Sections 3 and 15 of the TGA and Sections 402(d) and (e) of FLPMA entrust to the Secretary of Interior the responsibility for determining and adjusting livestock numbers on public lands. The Secretary has delegated this responsibility to BLM. BLM may not delegate this responsibility to the ranchers. BLM works cooperatively with ranchers, the state having lands or responsibility for managing resources, and the interested public in determining terms and conditions of grazing permits and leases, including the number of livestock to be grazed. Permits and leases contain terms and conditions to ensure that grazing occurs in conformance to land use plans, which are developed with public involvement.

The regulations at section 4110.2–2 do not provide for the establishment of preference solely on the basis of the forage allocation contained in the land use plan. Rather, they state that, alternatively, preference may be established in an activity plan or by decision of the authorized officer under section 4110.3–3. Some land use plans determined a forage allocation for livestock on an area-wide basis and apportioned that allocation among qualified applicants. Other land use plans simply recognized previous allocations and stated that future adjustments to these allocations would be guided by the multiple use objectives contained in the land use plan, be implemented by grazing decisions, and be supported by monitoring information.

Section 4110.2–3 Transfer of Grazing Preference

The proposed rule made editorial changes to this section to conform the rule to the definition of ''grazing preference.''

A comment on this section suggested that before issuing a permit or lease that arises from transfer of preference, BLM should conduct capacity surveys, condition assessments, evaluate monitoring data, and complete NEPA compliance documentation so that the terms and conditions of the permit or lease that we issue reflects current allotment conditions.

BLM does not control when or for what allotments it will receive applications to transfer grazing preference and issue a permit arising from that transfer. By the end of fiscal year 2003, BLM had assessed about 40 percent of its allotments for achievement of standards of rangeland health. In these areas, BLM reviews the application in light of the existing assessment and NEPA compliance documentation, and issues the permit or lease with appropriate terms and conditions. BLM continues to prioritize its data gathering needs based on known resource management issues. If BLM does not conduct an assessment of rangeland health and otherwise ''fully process'' a permit or lease application that accompanies a preference transfer, it includes terms and conditions on the newly issued permit or lease to ensure achievement of the standards and conformance to appropriate guidelines. These permit or lease terms and conditions include a statement that, if a future assessment results in a determination that changes are necessary in order to comply with the standards and guidelines, BLM will revise the permit or lease terms and conditions to reflect the needed changes.

Section 4110.2–4 Allotments

In the proposed rule, we removed the requirement that BLM consult with the interested public before making an allotment boundary adjustment because it is primarily an administrative matter that we implement by decision or agreement following a NEPA analysis of the action. This means that, under the final rule, allotment boundary changes will no longer trigger required consultation, cooperation, and coordination with the interested public. This change is intended to improve the administrative efficiency of grazing management.

Many comments expressed opposition to any reduction in the role of the interested public, but relatively few comments addressed this particular function. One comment stated that this change would affect the public role in NEPA analysis of boundary changes. That is incorrect. The public role under NEPA is unaffected by this rule change.

One comment stated that boundary adjustments could affect native plant populations and requested continued public involvement. Environmental issues such as impacts on native plants are best addressed through the NEPA process, which is unaffected by this change. BLM has found that much of the required consultation with the interested public is duplicative of these other processes and often delays routine, non-controversial decisions.

In BLM's view, the NEPA process, informal consultations and the ability to protest before a decision is final provide adequate mechanisms to identify legitimate public concerns over boundary changes. Thus, no changes have been made in the final rule.

One comment on this section suggested that BLM should consult with base property lien holders before adjusting allotment boundaries, and should remove its authority to adjust allotment boundaries by decision so that the permittee or lessee has control over allotment boundaries rather than BLM.

We have not adopted these comments in the final rule. Under section 4110.2–4, BLM will consult with affected permittees or lessees before adjusting allotment boundaries. Should permittees or lessees wish to consult regarding boundary adjustment proposals with those holding liens on their base properties, they may do so at their option. It is necessary for BLM to retain authority to adjust allotment boundaries by decision for those situations where all affected parties cannot reach consensus regarding an allotment boundary adjustment.

Section 4110.3 Changes in Grazing Preference

In the proposed rule, we removed the term ''permitted use'' wherever it occurred in this section and replaced it with the term ''grazing preference'' for the reasons explained previously. We also added a third paragraph to provide that our NEPA documentation addressing changes in grazing preference would include consideration of the effects of changes in grazing preference on relevant social, economic, and cultural factors.

Numerous comments addressed both aspects of this section.

One comment stated that BLM should only consider changes in preference when there has been a permanent change in the number of AUMs available for attachment to base property. The comment asserted that, because AUMs of preference were established through formal adjudication, it would be inappropriate for BLM to change grazing preference as needed to manage, maintain, or improve rangeland productivity, to assist in restoring ecosystems to properly functioning condition, to conform to land use plans

Appendix H

USFWS CMR Grazing Policy – Regional Director

United States Department of the Interior

FISH AND WILDLIFE SERVICE

Charles M. Russell National Wildlife Refuge Complex
PO Box 110, 333 Airport Road
Lewistown, MT 59457

January 9, 2020

Dear ,

Thank you for your patience in this matter. Our policy only allows us to transfer existing grazing permits from the current permittee of record to their spouse or their children. The laws that dictate grazing policies and practices on BLM lands do not apply to refuge lands, and we manage grazing and permitting much differently than BLM.

We currently have two different types of grazing on CMR refuge, annual and prescription. Annual grazing is a legacy refuge use from when CMR refuge was managed jointly by the FWS and BLM, in which FWS managed wildlife, habitat, and recreation, and BLM managed livestock grazing. This occurred from 1936 - 1976; in 1976 congress passed the Game Range Act that gave the FWS sole jurisdiction over CMR. From 1976 - 1986, FWS completed a grazing and monitoring plan as part of an Environmental Impact Study (EIS). This EIS developed the policies and practices for managing livestock grazing on CMR. Several benchmarks of the plan were implemented after 1986, including stocking rate reductions and permit transfer practices. In 1994, all grazing permit transfers ceased, and whenever a grazing permittee of record ended livestock grazing operations on CMR, or passed away, the permit was retired and the habitat unit went into prescription grazing with a prescription for rest from grazing.

Transfer policy changed again in 2004, when there was increased interest in policies that supported family succession planning in agriculture locally. Since 2004 to the present, we allow the transfer of grazing permits to a spouse or children. When there is not a spouse or child that is interested in the grazing permit, and the permittee of record is no longer interested in or able to utilize the CMR permit, the permit is retired and the habitat unit is moved into prescription grazing with a prescription for rest from grazing.

The other type of grazing on CMR is prescription. Prescription grazing occurs when refuge managers prescribe a habitat treatment, for the benefit of wildlife, utilizing cattle or other livestock selected to best achieve habitat objectives. We have had a limited amount of this type of grazing in the past as we have been transitioning from annual grazing to prescription grazing, but expect to have more opportunities in the future. Our legal authorities for managing wildlife refuges support the use of livestock as a habitat management tool, but not simply as an economic use. Recent policy requires us to award prescription grazing opportunities through a competitive process, and not associate grazing permits to private land or a particular person. All future prescription grazing opportunities will be utilized for the management of wildlife habitat, and awarded through a competitive process.

Attached are the 1994 Grazing Transfer Policy and the 2004 update to that policy. Thank you for your interest and if you have any further questions please call Dan Harrell at the Sand Creek Station: Phone (406) 464-5181 ext. 15

Sincerely,

Dan Harrell

United States Department of the Interior

FISH AND WILDLIFE SERVICE

Charles M. Russell National Wildlife Refuge
P.O. Box 110
Lewistown, Montana 59457

Dear Permittee:

Policies regarding the transferability of grazing permits on the Charles M. Russell National Wildlife Refuge (CMR) were recently reviewed in light of additional court decisions involving CMR grazing and discussions on maintaining the viability of single-family ranches.

This letter updates the policy letter on transferability sent to you on May 27, 1994. A copy of this letter is enclosed for your reference.

The 1966 National Wildlife Refuge System Administration Act, as amended, and three specific federal court cases govern grazing on CMR. The court decisions are: Schwenke et al. versus Secretary of Interior et al. Ninth Circuit Court of Appeals, October 1983, Schwenke et al. versus Secretary of Interior et al. U.S. District Court, May 1990 and Kirkland versus Secretary of Interior et al. U.S. District Court, May 1996. The Refuge Administration Act of 1966, as amended, replaced the Taylor Grazing Act as the Legislative authority over CMR grazing in 1976 by an Act of Congress.

The pertinent court findings are: grazing permits do not establish rights; the permits are discretionary with the administering agency (Fish and Wildlife Service); CMR grazing permits expire every year according to their own terms; and plaintiff(s) presented no authority that a permittee has a right to have grazing privileges renewed every year.

The 1994 policy letter stated “Therefore, effective with this letter, grazing privileges on CMR will no longer automatically transfer with the sale of a ranch or a ranch portion, nor may a permit be sold. The permit will not be automatically transferred to family members through inheritance or

other arrangement. When the current permittee relinquishes his or her permit through sale, death, or other arrangement, the permit will revert to the Refuge and be held in abeyance for one year. During the one-year period, management actions will be reviewed and an Environmental Assessment completed to ensure grazing follows applicable laws and the 1986 Record of Decision for the CMR Final Environmental Impact Statement. The Fish and Wildlife Service will decide if a grazing permit would be reissued, who the permittee would be, and what stocking rate and season of use would be necessary. Livestock grazing in those habitat units may change significantly from historic use."

The above policy will remain in full force and effect, but to help ensure that a family ranch may be passed to a son or daughter, the following exception is created. An existing permittee may add a spouse, son or daughter to the permit without invoking all of the requirements of the current Service policy on permit transfers. Specifically, the addition of a son or daughter *would not* trigger a mandatory cessation of grazing while the Service conducted a detailed habitat analysis (typically, an environmental assessment). *If*, however, analysis indicated that wildlife habitat objectives were not being met on this unit, there *would* be an Animal Unit Month (AUM) reduction and/or change in seasons of use. This will allow families to proceed with estate planning with the assurance that CMR grazing will remain with the ranch if the wildlife objectives allow livestock grazing.

Please contact the Lewistown Office at 406/538-8706 if you have questions or desire clarification related to a specific situation.

Sincerely,

Regional Director